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IN THE

Supreme Court Of The United States

On Certiorari to the United States Circuit Court of Appeals
Fifth Circuit

No. 330

OCTOBER TERM, 1940

OPP COTTON MILLS, INC., ET AL,
Petitioners,

versus

ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR,
Respondent.

BRIEF FOR PETITIONER AND INTERVENORS

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ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR,
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BRIEF FOR PETITIONER AND INTERVENORS

OPINION BELOW

This case is here on Writ of Certiorari granted by this Honorable Court on October 14, 1940, to review a decision and order of the Circuit Court of Appeals of the Fifth Circuit affirming a wage order of the Administrator of the Wage and Hour Division of the Department of Labor, the decision being reported in 111 F. 2d, at page 23.

PRELIMINARY STATEMENT

The proceeding is an attack by a group of small cotton mills of the Deep South against the wage order of Elmer F. Andrews, former Administrator of the Wage and Hour Division, fixing the minimum wage of the cotton textile industry at thirty-two and one-half cents. This wage order raised the statutory minimum from thirty cents, and was

made applicable to all employees engaged in the cotton textile industry, without establishing any classifications or differentials as between regions, or between employees in the various branches of the textile industry; and was made effective without any trial of the thirty cent minimum established by Congress.

Petitioners and intervenors (hereinafter called petitioners) filed their petition asking that the Circuit Court of Appeals review and set aside said wage order, contending that the procedure of the Industry Committee and of the Administrator was not in accordance with the law and denied them due process of law, that there was no substantial evidence to support the Administrator's findings and order, and that the Fair Labor Standards Act, as interpreted and applied to them, was unconstitutional. Said Court held against all of these contentions, and Petitioners and Intervenors seek to have this decision reversed and these contentions sustained by this Honorable Court.

JURISDICTION

Jurisdiction is specifically conferred on this court by Section 10 of the Fair Labor Standards Act—the Act of June 25, 1938, paragraph 10, 52 Stat. 1065, 29 U. S. C. A. 210:

> "Any person aggrieved by an order of the Administrator . . . may obtain a review of such order in the Circuit Court of Appeals . . . by filing in such court . . . a written petition praying that the order of the Administrator be modified or set aside in whole or in part. . . . The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 347 and 348 as amended."

The order of the administrator was entered on September 29, 1939, (R. 259). On October 20, 1939, the Petitioner herein filed its petition in the United States Circuit Court of Appeals for the Fifth Circuit to have said order set aside; and the Intervenors, leave of court having first been had and obtained, intervened as co-parties with said Petitioner. Thereafter, on the 2nd day of April, 1940, said United States Circuit Court of Appeals for the Fifth Circuit filed its opinion (R. 356) and entered its order (R. 366), denying the relief prayed for by the Petitioner and Intervenors and affirming the action and wage order of the Administrator. Whereupon, a petition for rehearing was filed in said court on the 19th day of April (R. 367), which petition for rehearing was denied by said court on the 16th day of May, 1940. (R. 380). On petition therefor, the mandate of the Circuit Court of Appeals was stayed on a continuation of the bonds given for the stay of the order of the Administrator (R. 383), and on June 22, 1940, before the expiration of the previous order, an additional stay was granted, allowing Petitioner and Intervenors until August 15, 1940, to petition this court for certiorari, and continuing the stay until the matter could be disposed of in this court (R. 387). On petition filed August 13, 1940, this court granted Certiorari, October 14, 1940.

BRIEF OF ARGUMENT

POINT I

THE PROCEDURE OF THE ADMINISTRATOR AND OF THE INDUSTRY COMMITTEE WAS NOT ACCORDING TO LAW IN THAT IT DID NOT AFFORD A FULL, FAIR AND COMPLETE HEARING AS REQUIRED BY DUE PROCESS OF LAW.

A. The Wage Order is Void Because Industry Committee No. 1 was not constituted in Accordance with The Requirements Of The Act.

Fair Labor Standards Act—Sec. 5—(29 U. S. C. A. 205).

B. The Wage Order is Void Because the Definition of the Textile Industry, as Set Out In The Findings of The Administrator, was not Seasonably Made In Compliance With The Requirements of The Act.

Fair Labor Standards Act—Secs. 5 and 8—(29 U. S. C. A. 205 and 208).

C. The Wage Order is Void Because the Committee Did Not Proceed In Accordance With The Requirements of The Constitution and Of The Act.

Fair Labor Standards Act—Secs. 5 and 8—(29 U. S. C. A. 205 and 208).

D. The Procedure Followed By The Committee and the Administrator Renders His Action Void Because Not Affording a Full and Fair Hearing As Required By Due Process of Law.

Morgan v. U. S., 298 U. S. 468; 304 U. S. 1, 23.

Morgan v. U. S., 307 U. S. 183.

Ohio etc. Co. v. Public Util. Com., 301 U. S. 292.

POINT II

THE ADMINISTRATOR'S FINDINGS WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Wage Order is Void Because The Administrator's Findings that the Proposed Minimum will Not Substantially Curtail Employment, or Give A Competitive Advantage to Any Group, Is Not Supported By Substantial Evidence.

Morris v. Harmer, 7 Peters 554; 8 L. Ed. 781.

Florida v. U. S., 282 U. S. 194; 75 L. Ed. 291.

Panama v. Ryan, 293 U. S. 388; 79 L. Ed. 446.

Fair Labor Standards Act—Sec. 10—(29 U. S. C. A. 210).

NLRB v. Bell Oil & Gas Co. (C. C. A. 5, 1938) 98 F. (2d) 406.

South Ala. Co. v. Com. Int. Rev. (C. C. A. 5, 1939) 104 F. (2d) 27.

B. The Wage Order is Void Because The Establishment of a Uniform Minimum—without Classifications or Differentials—is Contrary to Law and not Supported by Substantial Evidence.

Fair Labor Standards Act—Sec. 8—(29 U. S. C. A. 208).

C. The Wage Order is Void Because The General Conclusions of the Administrator are Contrary to Law, and are not Supported by Substantial Evidence.

POINT III

THE FAIR LABOR STANDARDS ACT IS UNCONSTITUTIONAL AS INTERPRETED BY THE ADMINISTRATOR AND SOUGHT TO BE APPLIED TO PETITIONERS.

A. The Act is Unconstitutional Because Congress Does not Possess the Power To Enact it, Same Being Reserved to The States Under The Tenth Amendment.

Bailey v. Drexel Furniture Co., 259 U. S. 20; 66 L. Ed. 817.

Coe v. Errol, 116 U. S. 517; 29 L. Ed. 715.

Champlin Refining Co. v. Corp. Com., 286 U. S. 210; 76 L. Ed. 1062.

Carter v. Carter Coal Co., 298 U. S. 238.

Collins v. New Hampshire, 171 U. S. 30; 43 L. Ed. 60.

Chassanoil v. Greenwood, 291 U. S. 584; 78 L. Ed. 1004.

Dartmouth College v. Woodward, 4 Wheat, 518, 629.

Hammer v. Dagenhart, 247 U. S. 251; 62 L. Ed. 1101.

Heisler v. Thomas Collery, 260 U. S. 245; 67 L. Ed. 237.

Kidd v. Pearson, 128 U. S. 1; 32 L. Ed. 346.

Oliver Iron Mining Co. v. Lord, 262 U. S. 172; 67 L. Ed. 929.

Panama Refining Co. v. Ryan, 293 U. S. 388; 79 L. Ed. 446.

Rickert Rice Mills v. Fontenot, 297 U. S. 110; 80 L. Ed. 513.

Schechter Poultry Co. v. U. S., 295 U. S. 495; 79 L. Ed. 1570.

United States v. Ohio Oil Co., 234 U. S. 548; 58 L. Ed. 1459.

United States v. Butler, 297 U. S. 1; 80 L. Ed. 477.

B. The Act is Not Justified by the Commerce Clause Under Which (by its Terms) it is Sought to be Brought.

Bacon v. Illinois, 227 U. S. 504, 516; 57 L. Ed. 615.

Board of Trade v. Olsen, 262 U. S. 1; 67 L. Ed. 839.

Coe v. Errol, 116 U. S. 517; 29 L. Ed. 715.

Crutcher v. Kentucky, 141 U. S. 47; 35 L. Ed. 649.

Carter v. Carter Coal Co., 298 U. S. 238; 80 L. Ed. 1160.

Coronado Coal Co. v. United Mine Workers, 268 U. S. 295; 69 L. Ed. 963.

Dartmouth College v. Woodward, 4 Wheat, 518, 629.

Delaware L. and W. R. Co. v. Yarkonis, 238 U. S. 439; 59 L. Ed. 1397.

Gibbons v. Ogden, 9 Wheat 1; 6 L. Ed. 23.

Hammer v. Dagenhart, 247 U. S. 251; 62 L. Ed. 1101.

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Kidd v. Pearson, 128 U. S. 1; 32 L. Ed. 346.

Ken. Whip & Collar Co. v. Ill. Ct. R. Co., 299 U. S. 334; 81 L. Ed. 270.

Lottery Cases, 188 U. S. 321; 47 L. Ed. 492.

McDermont v. Wisconsin, 228 U. S. 115; 57 L. Ed. 754.

Mulford v. Smith, 307 U. S. 38; 83 L. Ed. 1092.

Milk Control Board v. Eisenberg Farm Pdts., 306 U. S. 346; 83 L. Ed. 752.

NLRB v. Jones & Laughlin S. Corp., 301 U. S. 1, 37; 81 L. Ed. 893.

Old Dearborn D. Co. v. Seagram Distlg. Corp., 299 U. S. 183, 81; L. Ed. 109.

Schechter Poultry Co. v. U. S., 295 U. S. 495; 79 L. Ed. 1570.

Second Employer's Liability Cases, 223 U. S. 1; 56 L. Ed. 327.

Stafford v. Wallace, 258 U. S. 495; 66 L. Ed. 735.

Santa Cruz Fruit Packing Co. v. NLRB, 303 U. S. 453; 82 L. Ed. 954.

Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381.

Texas & P. v. U. S. (*Shreveport case*), 234 U. S. 342; 58 L. Ed. 1341.

U. S. v. Rock Royal Cooperative, 307 U. S. 533; 83 L. Ed. 1446.

United Mine Workers v. Coronado Coal Co., 259 U. S. 344; 66 L. Ed. 975.

Weber v. Fried, 239 U. S. 325; 60 L. Ed. 308.

C. The Act is Unconstitutional Because it Constitutes an Unwarranted Delegation of Legislative Power to the Administrator.

Mulford v. Smith, 307 U. S. 38; 83 L. Ed. 1092.

Panama Refining Co. v. Ryan, 293 U. S. 388; 79 L. Ed. 446.

Schechter Poultry Co. v. U. S., 295 U. S. 495; 79 L. Ed. 1570.

U. S. v. Rock Royal Cooperative, 307 U. S. 533; 83 L. Ed. 1446.

D. The Act is Unconstitutional Because it Denies to These Litigants Due Process of Law In Contravention of the Fifth Amendment.

Adair v. U. S., 208 U. S. 161; 52 L. Ed. 436.

Adkins v. Childrens Hospital, 261 U. S. 525; 67 L. Ed. 785.

Chicago Ets. R. Co. v. Chicago, 166 U. S. 226; 41 L. Ed. 979.

Coppage v. Kansas, 236 U. S. 1; 59 L. Ed. 441.

Home Telephone Co. v. Los Angeles, 227 U. S. 278; 57 L. Ed. 510.

Lawton v. Steel, 152 U. S. 133; 38 L. Ed. 385.

Louisville v. Radford, 295 U. S. 555; 79 L. Ed. 1593.

Morehead v. New York, 298 U. S. 587; 80 L. Ed. 1347.

Monongahela Nav. Co. v. U. S., 148 U. S. 312; 37 L. Ed. 463.

Murry v. Hoboken, 18 How. 272; 15 L. Ed. 372.

U. S. v. Chicago M. St. P. & P. R. Co., 282 U. S. 311; 75 L. Ed. 359.

West Coast Hotel Co. v. Parish, 300 U. S. 379; 81 L. Ed. 703.

Wilson v. New, 243 U. S. 332; 61 L. Ed. 755.

STATEMENT

Immediately after the creation of the Wage and Hour Division of the Department of Labor, the Administrator, by Administrative Order No. 1, undertook to appoint an industry committee, pursuant to the terms of the Act, to be organized and designated as Industry Committee No. 1 for the Textile Industry (R. 59). The Administrator incorporated in his order a definition of the Textile Industry for which the committee was appointed. The definition contained in the order was amended on two separate occasions, the last being one day prior to the filing of the report of the committee (R. 61, 64). The amendments to the definition were material and substantial in that they changed the limits within the industry in which the committee was to function and the number, occupation and personnel of the employees who would be affected by such wage order as might be adopted pursuant to the recommendation of the committee. (Id. and R. 78).

In defining the industry, the administrator arbitrarily excluded wool and other sections of the textile industry in which high wages were paid and arbitrarily included twine, cordage and other industries whose products were not textiles. The apparent purpose of this arbitrary classification and grouping was to avoid any activity on the part of the committee looking toward the establishment of classifications within the industry for the purpose of establishing wage differentials as provided in the Act.

The cotton textile branch of the textile industry, cordage, twine, and similar products, are the low wage segments of the spinning and weaving industry. Approximately 75% of those who work in cotton textile mills are employed in establishments situated in the cotton growing states.[1] Under the terms of the Act [Sec. 5(b)], it was the duty of the Administrator to give due regard to the geographical regions in which industry was carried on when he appointed the persons to represent the various groups allowed representation on the committee. Thus, in appointing the committee, the Administrator should have appointed 75% of each group from the cotton growing states. [Sec. 5(b)]. However, the committee as finally constituted gave the cotton growing states a representation of only 42.4%.

The committee held four meetings, their dates being October 11, December 14, 1938, March 21, and May 22, 1939. The first meeting was devoted to getting acquainted with the Administrator, his counsel and staff, and in hearing general explanations and discussions of the duties of the committee. Thereupon, sub-committees were appointed to handle certain phases of the work, and it was decided to invite various members of the industry to come before a subsequent meeting.

At the second meeting of the committee, a sub-committee was appointed to study the matter of a minimum wage to be recommended. This sub-committee never arrived at any recommendation to be made on the matter of the minimum wage, and reported back its inability to agree. (R. 1717)

At the third meeting, the report of the sub-committee was received, and without discussion, hearing, or study, the committee adopted the motion of one of its members that a minimum wage of 32½ cents per hour be recommended to the

[1]Cf. R. 1767 and R. 1838.

Administrator and that a sub-committee be appointed to draft the report. The task of drawing the report and recommendation was subsequently committed to employees on the staff of the Administrator of the Wage and Hour Division. This report was prepared and submitted to the meeting of May 22, at which it was adopted and submitted to the Administrator. (R. 1718 et sec.)

Three days after the majority report of the committee was filed with the Administrator, a notice of hearing thereon was issued and was later published in the Federal record. The dates and places for hearing provided for in the notice were the Raleigh Hotel, Washington, D. C., on June 19, 1939, and the Ansley Hotel, Atlanta, Georgia, on June 26, 1939. Hearings were held at the times and places designated, and again in Washington, D. C. On September 29, 1939, the Administrator published his findings and conclusions, together with his order approving and adopting the recommendation of the majority of the committee. (R. 259 et sec.)

On the hearing before the Administrator, there was substantial evidence to the effect that there was a large difference in the prevailing wage rate then in effect in the southern or cotton growing states, and particularly in the small southern cotton mills and those paid in other sections of the country. There was no competent evidence tending to contradict this contention. There was direct testimony before the Administrator, by witnesses qualified to testify from their own knowledge, that living costs were substantially lower in the cotton producing states,—and particularly in the small towns and villages where the mills of these petitioners were located,—than in other sections of the country and in the large cities. There was no evidence whatever to contradict this contention. As establishing the contrary, the Administrator heard and accepted conclusions based on statistical surveys made over a limited area and in communities where no cotton

mills were located by persons whose qualifications were not shown, who did not appear as witnesses, and whose basic data was not made available on the hearing.

It was shown without contradiction that wage differentials had been uniformly recognized by the Federal Government under such activities as the National Recovery Administration, the Social Security Administration, the Government Contract Payment (Walsh-Healy) Act, the Works Progress Administration wage scale, as well as under existing labor contracts; and that the requirements of freight rate differentials had brought about existing differences in wage scales in the various sections of the country in which the textile industry was located.

It was shown without contradiction that the effect of the raise in wage rates from 25 cents per hour to 30 cents per hour would cause a number of mills then in operation to go out of business and that since these mills were not as modern and as well equipped with labor saving devices and machinery, the larger mills supplying the demand previously met by the smaller mills would not absorb the consequent unemployment. It was also shown that the employees displaced by the closing of the smaller mills would not be able to obtain employment in the larger mills because of their lack of training and inability to migrate to the mills whose output would be increased.

In making his findings, the Administrator disregarded the undisputed, direct testimony, and undertook to support his conclusions from findings made by witnesses who attempted to qualify as experts in the analysis and interpretation of statistical data, and who testified from the data furnished them, without the same having been identified or vouched for by the statistician who compiled it or who collected and analyzed it.

Notwithstanding the elimination of the consideration of wage differentials from the deliberations of the committee, the Administrator found that there was no valid objection to, or irregularity in, the definition made and promulgated on the day preceding the filing of the majority report of the committee. Notwithstanding the clear and explicit terms of the Act, the Administrator found that the committee had properly performed its function, although it had eliminated the consideration of wage differentials, differentials in transportation costs, differentials in mill output per man-hour, and differences in actual taxes paid by mills. The administrator found, without any competent, substantial evidence to support the finding that the recommendation of the committee was supported by substantial evidence, and was made according to law.

ARGUMENT

POINT I

THE PROCEDURE OF THE ADMINISTRATOR AND OF THE INDUSTRY COMMITTEE WAS NOT ACCORDING TO LAW IN THAT IT DID NOT AFFORD A FULL, FAIR AND COMPLETE HEARING AS REQUIRED BY DUE PROCESS OF LAW.

A. Industry Committee No. 1 was not constituted with due regard to geographical regions in which the textile industry is carried on, as required by the Act.

The Court will sense before it proceeds far, that this is a grim fight for existence on the part of the small cotton mills of the Deep South. That appears from the testimony of every witness who took the stand, from the Committee's actions and report and the minority report, from the Administrator's findings and report—and there is no possible escape from it. In the light of that fact, the geography of the Committee becomes one of the most important elements in this case.

The Act speaks on the subject with complete clarity and certainty [Section 5(b)]:

> "In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on"

The cotton industry was the chief reason for the appointment of Industry Committee No. 1, and all of the proceedings taken in connection with it and the Administrator's hearing and report on their recommendation. No one willing to face facts frankly would have any doubt about that.

The record abounds in proof that approximately seventy-five percent of those who work in cotton textiles work in mills situated in the cotton-growing States.[2] On that basis, the South would have been entitled to approximately three-fourths of each group. The logical thing to do would have been to make the groups to be composed of eight individuals, instead of seven; but, since the Administrator chose the latter figure, the South would have been entitled to a little better average than five members of each seven-man group.

Instead of that, the South was given three members of the public group, or 42.9 (even counting Tennessee as a cotton growing State, and it does not offend much in that direction), four members of the employer group or 57.1% (counting Virginia as a cotton-growing State, although it is on the fringe), and two members, or 28.6% of the employee members, or a total of nine members out of 21, or a composite total percentage of 42.4%.

Position of Small Mill Group Unique.

The Court will not fail to grasp the fact that the position of the small mill group of the Deep South is unique and

[2] Cf. R. 272 and R. 1838 mentioned in Note 1 supra. But compare this with the second table, R. 274.

is separate alike from the Mills of the North, and the large mills of Virginia, the Carolinas and north Georgia. That appeared, without contradiction, throughout the testimony. If percentages were available to show the representation of the States in which this group is situated, the picture would look even blacker than it is. The discrimination against the South is further reflected when the gerrymandering within the groups is considered.

The percentages the two interested groups were not as important as those e public group, which might be considered as the "umpire" group. The traditional cohesiveness of the employee group would insure that they, as a unit, could combine with the majority representation in the public group toward the establishment of the highest wage level that a majority in the public group would sanction. Inasmuch as the northern group of employers was interested in a higher wage minimum (as will be abundantly shown in this argument) and the attitude of the northern public members would be reflected in the same direction, this discrimination amounted to the appointment of a Committee at whose bar the South did not have a ghost of a chance.

An explanation of the Northern predominance in this Committee can, perhaps, be found in a couple of unguarded remarks made by the Administrator when he was under fire for the unfairness of the Committee (R. 1055 and T. 2021)[3]

[3]The transcript reference is to the testimony of Robert R. West, which is as follows:

"ADMINISTRATOR ANDREWS: You were very gracious to serve on the Committee. Do you remember who asked you to serve on the Committee?

THE WITNESS: I was.

ADMINISTRATOR ANDREWS: Frankly, I don't remember whether I called you directly.

THE WITNESS: No.

ADMINISTRATOR ANDREWS: Or whether somebody else did.

THE WITNESS: Mr. Administrator, I recognize that I am under oath.

ADMINISTRATOR ANDREWS: Yes.

in which the Administrator indicated directly that his chief consultants in making these appointments were the officials of the Cotton Textile Institute, the traditional spokesman for the northern segment of the cotton textile industry.

It was further undisputed that the vast majority of the cotton mill workers of the South were unorganized. In spite of that, the Administrator placed on the employee group two members of the American Federation of Labor, five members of the C.I.O. (relatively quite small in the South) and left wholly unrepresented the vast multitude of unorganized Southern workers.

Considering the fact that this enormous wage increase, which was borne almost entirely by the South, was fastened on it by a predominantly sectional vote, the importance of these considerations would be hard to over-estimate.

Administrator's Explanation Unconvincing.

It is not hard to understand that the Administrator assigned so few pages to his explanation of this vital discrimination. In truth, no explanation is possible. Even taking that which he attempts to make by the inclusion of rayon and silk in his figures, we have his admission, as contained in his report (R. 274) that the South has 55% of this composite group of wage earners, and the North 45%.

In any event, therefore, the South ought to have had 55% of the public members, and it had a little less than 42.9%. It

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THE WITNESS: But I will recite as near as I can my recollection of it. I was called one day by the President of the Cotton Textile Institute and asked if I would serve on the Committee if I were invited to do it.

ADMINISTRATOR ANDREWS: Do you know, sir, that probably one of the best known and most respect-paid organizations in the country is the Cotton Textile Institute?

ought to have had 55% of the employee members, and it had, in fact, 28.6%. It ought to have had 55% of the whole number, when, in fact, it had a little less than 42%.

These figures are given on the assumption that it was proper to bring silk and rayon in at their relative percentages. As a matter of fact, this was not proper at all.

It was the cotton industry that was to be affected as is shown abundantly by the evidence. It was cotton which was the "sick" industry. It was the small cotton mills of the South which were offering such real competition to the large ones in the other sections of the country, and it was cotton that the whole proceeding was calculated to reach.

The fair thing to do, therefore, was to select an Industry Committee competent to pass on the phase of the industry to which it devoted nine-tenths of its time and attention, and to follow the mandate of the statute with an eye fixed on the duties the Committee had to perform. The bringing in of the rayon and silk segments of the industry to justify this action are simply an effort to give some plausibility to an action wholly barren of any justification. In the many bits of repartee had between the Administrator and the witnesses during the hearing, when he was being criticized for his unfairness to the South, such a thing as this was never mentioned. The reason he assigned, in every instance recalled, was that he consulted the Cotton Textile Institute and relied on their recommendations.

The fact is, however, that, if the administrator wanted to include rayon and silk and wanted to observe the statutory requirements that the members of the committee be appointed according to the regions "in which the industry is carried on", he ought to have determined that by the number of employees in the various regions who would be affected by his order. The fact is that considering cotton, rayon, and silk, only

16,735 workers are affected by the wage order in the North while 127,258 are affected by this order in the South. Measured by that standard, he ought to have appointed 11.7% of the committee from the North and 88.3% of the membership from the South.

It is hard to follow the statement of the Administrator (R. 276) that he did not feel that the selection of the Committee was a proper issue for determination in this proceeding. That position is directly the opposite of that which he took when oral argument was in progress before him prior to rendition of his decision. (T. 3363)[4]

Geography of Committee before this Court.

At all events, this question is certainly one for this Court to determine. The requirements of the statute in that regard are mandatory. The consist of the Committee was before the Administrator as one of the facts concerning which he had to make a finding, in order to approve the Committee's recommendation. His finding that the Committee was constituted in accordance with statutory requirements has no evidence to support it, and the Administrator's order, made pursuant thereto, must be set aside.

Respondent contended in the Court below that the Act confers upon the Administrator conclusive contemporary administrative authority to determine the meaning of "due regard" while selecting the Committee. It is not denied that administrative discretion in the selection of personnel is conferred by the Act, so long as the appointees are representative and are from the appropriate regions. It is contended that administrative authority, coupled with a dis-

[4](T. 3363): ADMINISTRATOR ANDREWS: I think, Mr. Taylor, I have already ruled that the Administrator having appointed the Committee, it not in a position to say that the Committee was appointed illegally.

cretion is always subject to review on two grounds. First, the exercise of the discretion must not lead to acts outside the limits set by the legislative act under which it is conferred. Second, the discretion must not be abused.

These two tests of the validity of an administrative act are almost always treated together, an abuse of authority itself being in excess of the power conferred. But the power of Courts to invalidate an improper exercise of power goes still further. The legislative purpose in conferring administrative power in the present case was to prevent an arbitrary requirement that territorial lines be observed, notwithstanding the fact that those to be affected by the action were all in one small area within the region. The scope of discretion may not be projected in the opposite direction, or even be ignored to the exclusion of the area affected from special consideration. In other words, the discretionary power conferred by the Act was intended to be used to prevent a failure of proper consideration of conditions in the area to be most affected by a Committee acting under Section 8(c). That these petitioners have been prejudiced by the failure of such consideration is demonstrated, by the vote of the Committee on the recommendation, as shown by the minority report (R. 162), and the division of the Committee personnel when considered against the geographical representations which made up that group.

Authorities previously relied upon by Respondent do not question the principle outlined above. *Brewster v. Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457, and *Houghton v. Payne*, 194 U. S. 88, 24 S. Ct. 590, 48 L. Ed. 888, are significant only in that they illustrate the right, if not the duty, of the Court to accept an administrative determination that is fair and just, and is within the possible meaning of a doubtful Statute. This is simply another rule of statutory construc-

tion to be applied by the Court where the legislative intent is not clearly expressed. *Rochester Telephone Co. v. United States*, 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147, is of doubtful application. However, the language relied upon by Respondent is as follows: "So long as there is warrant in the record for the judgment of the expert body, it must stand." This presupposes a question which may not be determined by any but an expert agency. But it also demonstrates that the Court will search the record to see if it supports the action. It demonstrates that the Court must search the record to see if the action taken fairly conforms to the intention and purposes of legislative authority. The Court may not be expert in the specialized field committed to administrative discretion, but it is expert in ascertaining legislative intent, and it will always examine the act under review to see if it carries out the purposes of the legislation.

The inquiry becomes one of whether or not Congress, by the use of the phrase, "due regard," intended that the region where petitioners and other employers similarly situated should have only nine of the twenty-one members of the Committee as a whole; it appearing on the record, and not being anywhere disputed, that the action of the Committee would threaten the existence of their mills, and no others, and that the impairment of their operations would inure to the benefit of those remaining.

Other cases relied upon are of less import. The two state cases cited relate to review of special findings, or the lack thereof, in highly specialized proceedings. In *State v. McEachern*, 231 Ala. 609, 166 So. 36, the proceeding was *quo warranto*. The application Respondent sought to make was that while the Statute prescribed certain qualifications for the office, the Court refused to inquire into these, the County Commissioners not having done so. Counsel overlooked the

judicial nature of the County Commission, its special function and the intent of the act to continue the official in office. But the significant feature of the case is that the administrative board sought to remove the official under the authority conferred upon it, and the Court rejected its proceeding and continued the employee in office.

Ralston Co. v. Commissioner of Internal Revenue, 53 F. (2d) 948, simply reiterates the age-old rule that an administrative interpretation that makes a doubtful Statute fair and reasonable, will be accepted where the Statute will bear such a construction. *United States v. Interstate Commerce Commissions,* 88 F. (2d) 948, was mandamus which will not control discretion.

In *Reznor Hotel Co's License,* 34 Pa. Super. 525, 529, the words "due regard" were held, in administrative proceedings, to require consideration of the special circumstances of the case, and to include the knowledge possessed by the Court, facts whereof judicial notice would be taken, the testimony of witnesses, and the opportunities of petitioners.

That the Administrator's action was as arbitrary as it was prejudicial to these petitioners and the group to which they belong, is a conclusion impossible to escape when the undisputed facts are considered. Take the employer group, for instance—that being the only group where the South apparently had even a majority. All four of the representatives of the South came from the group of large mills situated on the Atlantic Seaboard. If the evidence in this case shows anything at all, it shows that the interest of that group lies predominantly with the Eastern group. A definite advantage to them alike will result if the competition of this small mill group can be eliminated. The fact stands out perfectly clear that although the Southern small mill group constitutes nearly one-third of the whole of cotton textiles, it did

not have a single representative on the employer branch of the Committee. The area where this small mill group did business—the five states of the deep South—was certainly one of the "geographical regions in which the industry is carried on," which should have been given "due regard" by the Administrator. The Administrator here construed "due" as synonymous with "zero" as far as this small mill group is concerned.

In that connection, Counsel spoke repeatedly of Mr. West, of Virginia, a member of the employer group. He is an estimable gentleman and an excellent cotton mill man, and despite his Northern origin and experience, was brave enough to stand out boldly against the majority Committee Report, and to join the minority in its able condemnation of what the majority did. At the same time, it cannot be forgotten that he is a large operator situated many hundreds of miles nearer the market and source of trained labor, and having all of the other advantages attendant on that location. Nor can one lose sight of the fact that he is an official in the Cotton Textile Institute, the admitted spokesman for the Eastern interests. It is worthy of more than passing note that Mr. West was asked to serve on this Industry Committee, not by the Administrator, but by the President of the Cotton Textile Institute, for which the Administrator, on several occasions, demonstrated considerable preference, referring to it in one instance as "probably one of the best known and the most respect-paid organizations in the country." (*Supra* P. 15, Note 3.)

The Administrator's attempted explanation of his favoritism in selecting the Committee remains no more persuasive as the result of Counsel's efforts in the court below to sustain it. It is still true that he knew before he appointed the Committee that the thing he was about was a major operation on the cotton industry. He had demonstrated that in many

ways, one of which was his action in getting Mr. Henrichs to prepare a symposium on cotton—not on rayon, silk, or anything else. He knew all the while that the victim of that major operation was to be the South.

He had read the Act and is bound to have known that the thing Congress was most concerned about was employment; its solicitude throughout was directed towards the human beings who would be affected by any wage order. Logically, therefore, major, if not sole, consideration in selecting a Committee should have been directed to the employees who would be affected—either possibly or actually. On that we accept, for the sake of this argument, the Administrator's figures that 55 per cent of all workers engaged in cotton, silk, and rayon were resident in the South. We set over against that, however, the much more pertinent fact that the total employees of these three affected by the order constituted a percentage of 88.3 in the South; if the more logical expedient should be adopted of considering workers in cotton alone, who were affected by the order, the South's percentage would exceed 95 per cent.

Taking an average of these three percentages, therefore, which gives a view of the picture from the standpoint of the human beings involved—those whose "employment" might be affected—we find that approximately 79 per cent of these employees are in the South. The "regard" extended to the South by the Administrator when he allotted less than 42 per cent of the whole Committee to it, falls far short of being "due" under any fair construction of the word. The unfairness of his actions is the more apparant when the Court considers that this "due regard" must be observed in the appointment of each group in the committee if the statute is to be followed.

B. The Textile Industry was not seasonably defined by the Administrator as required by the Act.

In addition to the consideration of the appointment of the Committee the proper consideration of the Administrator's findings and report will include the definition of the industry and the actions of the Committee, as well as the Administrator himself. This necessarily follows from the fact that the Act [Sec. 8(d)] makes it jurisdictional that the Administrator find affirmatively:

> ". . . . that the recommendations (of the Committee) are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as were considered by the Industry Committee, will carry out the purpose of this section . . ."

before the recommendations of the Industry Committee can be approved and a wage order promulgated.

It is contended by the petitioners that an accurate and understandable definition of the "Textile Industry" by the Administrator was absolutely essential before the Textile Committee could be appointed, and before it could proceed with its deliberations; and that the Committee, when convened, would have to know precisely the industry it was studying before it could act with intelligence.

It is further contended that the failure of the Administrator so to define the textile industry—which failure persisted up until the day the report was adopted—necessarily made the personnel of the Committee itself a haphazard matter, and made the deliberations of the Committee confused and indefinite, and made their report and recommendation the product of chance and guess-work, rather than of deliberate judgment, arrived at after due consideration and an appreciation of just what they were doing.

The Act itself [Section 5(a)] requires that—

> "The Administrator shall, as soon as practicable, appoint an Industry Committee for each industry in commerce or in the production of goods for commerce";

—and further [Section 8(a, b and c)] lays on the Administrator the duty to convene the Industry Committee. and further provides:

> "Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate, or rates, to be fixed for such industry. . . .
>
> The Industry Committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary. . . ."

It is clearly implicit in these provisions of the statute—and it could not well be otherwise—that the particular and precise limits of the industry shall be fixed by definite determination in advance of the selection of a Committee, so that the Administrator will know who to put on the Committee.

It is equally necessary, from the standpoint of the Committee when he convenes it, that they know the exact definition of the industry they are to investigate, so that they can consider the industry as a whole, and the classifications they shall find logical within the industry.

The Administrator wholly failed to arrive at or promulgate any definite or accurate definition of the industry before the Committee was appointed, or at any time during its deliberations, until a couple of months after final action had really been decided upon and when it had met back to go through the perfunctory proceeding of adopting a report it had theretofore appointed a Committee to draft.

Administrator's Efforts at Definition.

Let it be borne in mind that the industry the Administrator was seeking to provide a Committee for was the textile industry. That industry has a definite and fixed meaning, though its manifold ramifications embrace many and multifold classifications. Textile is thus defined in Webster's Collegiate Dictionary:

> "Textile—Of or pertaining to weaving, or to woven fabrics; as textile arts. . . .; woven or capable of being woven; formed by weaving; as, cotton and wool are textile fibers; textile fabrics—a woven fabric. . . ."

See, to the same effect, 62 Corpus Juris 862.

It would have been quite simple, therefore, for the Administrator to appoint a Committee of those having knowledge concerning the fabrics which are woven from various materials, and to commit to them the study of the industry engaged in manufacturing such fabrics. That would have involved the recognition of certain classifications within this woven fabric industry, such as cotton fabrics, woolen fabrics, silk fabrics, linen fabrics, rayon fabrics, and the like. If the Administrator had adopted that simple course, the confusion which followed his indecisive tactics would have been entirely avoided.

But he did not do that. Instead, (R. 260-1) he issued three definitions. In the first definition, he included, apparently, all of the steps involved in manufacturing and finishing "woven fabrics. . . . from cotton, silk, flax, jute or any synthetic fiber, or from mixtures of these fibers. . . ."

If he had stopped there, he had a pretty good definition of the textile industry, except that he left out wool—one of the most important classifications of that industry.

He did not do that, however, but went on and included such articles as batting and pile fabrics, knitted fabrics (wholly foreign to "woven" fabrics), and even included such things as braid, lace, rope and twine. The inclusion of such items as that overstepped the definition of "textile", and amounted to an arbitrary classification by the Administrator himself.

But he did not stop there. After the Industry Committee had convened and done most of its work (on December 19th, 1937) he amended that definition by adding the fabrication of such things as bags, blankets, diapers, bed-spreads, pillow cases, window curtains, and the like, from materials which had already been woven—a further arbitrary tacking on of certain processes not included in the true concept of "textile". (R. 260)

All the while, (R. 75) he was confiding, by correspondence, to the Industry Committee that he did not know exactly what it was he had called on them to consider, with the result—as will be demonstrated by a careful examination of the Journal of Committee proceedings (R. 1715)—that the Industry Committee spent a great deal of its time trying to help him define what they were supposed to do instead of spending their time doing it.

Finally, (R. 1727, 77) he appointed another Committee to consider woolen textiles (admittedly merely a branch or classification of the general term "textile") consisting, in part, of the same personnel as Industry Committee No. 1. He caused, thereupon, his general Textile Committee No. 1 and his Woolen Textile Committee (designated as Committee 1A) to meet in joint session, with the result that the remaining weeks of the Committee's life, which ought to have been spent in considering wage rates and differentials in the textile industry, were consumed in wrangling over the question

of why wool textiles should be sliced in two, and the exact point at which the slicing was to take place. The so-called wool Committee wanted to have jurisdiction over the whole branch of woolen textiles, but Textile Committee No. 1 insisted on assuming jurisdiction over woven fabrics having certain percentages of wool. (R. 1729 et sec.)

This time-consuming deadlock continued until the Chairman (of both Committees, incidentally) finally wrote the Administrator under date of May 22, 1939 (R. 1736) that the two Committees could not agree on the definition of the respective branches of the textile industry they were supposed to have jurisdiction over.

Faced, thus, with the dreaded eventuality of having the Committees establish a classification within the textile industry, the Administrator showed a decisiveness theretofore entirely lacking, and issued, on the same day, his fiat defining these two branches of the textile industry. He sent this definition to the two Committees with overlapping duties to perform in connection with the one "textile" industry. (R. 61-5, see also R. 1736-9)

In that definition, he left all of the items theretofore included by him, and added the manufacture of yarn and thread of wool mixtures, with any other fibers containing not more than 45% by weight of wool; and added, also, the manufacture or other processing of woven fabrics of mixtures of wool containing not more than 25% by weight, with the fibers theretofore included as subdivisions (a) of the definition originally made.

Administrator, Himself, Makes Classification.

The Court will understand that, while classifications within industries were clearly intended by Congress, the right to make those classifications was given exclusively to

the Committee. It will be further understood that the Administrator was given no right by the statute to initiate any classification, or any other action at all—his exclusive function being to approve or disapprove a Committee recommendation. It becomes of paramount importance, therefore, to determine whether the Administrator did, in fact, make a classification within this industry. If he did, he acted wholly without authority, and his action, and everything predicated on it, is void.

Recognizing, evidently, that he could not hope for the same minimum for the relatively lower paid cotton textile workers and the relatively higher paid woolen textile workers, the Administrator, at the outset, excluded wool entirely. His trouble seems to have arisen from the fact that it developed that some cotton mills were engaged in making cotton cloth with a certain percentage of wool yarns included. What that percentage was, or should be, was the much-mooted question.

At all events, to avoid the recommendation by Textile Committee No. 1 of a wage differential applying to workers in cotton and workers in wool, he adopted the expedient of appointing two separate Committees for the textile industry—one (Committee No. 1) to handle cotton mixed with certain percentages of wool, and the other (Committee No. 1A) to handle wool alone.

He included on this new Committee—No. 1A—five members of Industry Committee No. 1 (R. 1726-7): In this Administrative Order he required that—

> "The Industry Committee herein created . . . shall, in conjunction with Industry Committee No. 1, appointed . . . for the 'textile industry' as therein defined. . . . Consider the problem of precise definition. . . ."

That is what happened: These two Committees, having overlapping duties with respect to two branches of the "textile industry", did meet jointly. As heretofore stated, they could not agree on the line of demarcation between their respective branches of the textile industry—in other words, they could not arrive at a definite classification—and they reported their inability back to the Administrator.

The Administrator proceeded to make the classification for them and to issue Administrative Orders number 24 and 25 (Journal, pages 63-6 R. 1736-9). He thus entered a field not entrusted to him by the statute, trespassed upon the prerogatives of the Committee, and vitiated the action of both Committees in recommending separate *minima* for the branches of the textile industry resulting from his arbitrary classification.

Textile Committee No. 1 recommended a 32½ cent minimum for the cotton and cotton-wool classification of the industry; and Textile Committee No. 1A recommended a 36 cent minimum for the wool classification of the industry. We have, therefore, a clear classification "within the textile industry" made, not by the Committee, to whom this duty was given by statute; but by the Administrator, from whom the duty was withheld by the statute.

Intelligent Action By Committee Impossible Under Such Hazy Definition.

All this is, however important, somewhat of a digression. We were considering how it would be possible for the Committee to do a job when they never had been told what job they were supposed to do. They had most of their meetings between their appointment in September and the definition handed down in December. They had done all their work before the final definition on May 22nd.

In fact, they had (R. 1715, 1721) on March 21, 1939 taken definite action on the main things they were supposed to do—recommend minimum wages and differentials—and had (R. 1721) appointed a Committee to draft the report setting forth their action.

There was nothing remaining, therefore, for the whole Committee to do but to meet and hear the report of the drafting Committee and accept it, when the Administrator came forth with his final definition of May 22nd. What the Committee did was to proceed, as mere automata, to adopt the report long since drawn, and make it applicable to the new definition, without any opportunity whatever to consider the new definition, or hear any evidence, or make any intelligent decision with reference to the enlarged industry brought into being by it. (R. 1736)

We have mentioned, but in passing, the perfectly obvious proposition that the Administrator could not possibly select a proper personnel for his Committee in September when he did select it, because he did not know at that time what would be assigned to the Committee, and did not know that all of these various additions to the definition would be made. He could not give due regard to the geographical areas where the industry was carried on, because he did not know the branches of the textile industry he was going to commit to the Industry Committee he was appointing.

The Court will not lose sight of the fact that the sole authority of the Administrator is to approve or disapprove the Committee action. He has no authority at all to make classifications, such as he palpably made as between wool and all the other materials in the textile industry. His defining of the industry after the Committee had really taken final action with respect to minimum wages and differentials in that industry, amounts, really, to the assumption of power

on his part to diminish, or enlarge, the industry, or the classifications of it, to which the minimum established by Committee action should apply. This amounts to an arbitrary and capricious assumption by the Administrator of the function given by the statute to the Committee, and a forced abdication on the Committee's part of the discretion confided to it.

The apologetic for this juggling of the textile definition, which the Administrator attempts at great length to make, (R. 260-71) is wholly unconvincing. It seems to show that his indecision grew, in considerable part, out of pressure being brought to bear on him by various interested groups who wanted to be included in, or eliminated from, the textile definition. The function of a fixed and clear definition, therefore, was wholly lost sight of in the Administrator's effort to compose the differences between the competing elements. Feeling that he could, by these means, avoid the establishment by the Committee of classifications within the textile industry, the Administrator created an uncertainty which is fatal to the Committee's action.

This awkward and confusing handling of this very vital matter by the Administrator was, we submit, very prejudicial; and rendered the Committee's action ill considered and abortive, and the Administrator's action in approving its recommendations, for that reason alone, erroneous.

Respondent contended below that the procedure followed in working out the definition of the industry was in accordance with both the letter and spirit of the law. Nowhere in the Act is there any provision for referring the matter of definition to the Industry Committee. Neither is there any provision for inter-Committee action on delineation between industries. The Administrator is not designated as an umpire to settle jurisdictional disputes between industries. In

so far as the letter of the law is concerned, he is required only to define the industry in the order issued under Section 8(f).

As to the spirit of the Act, the Administrator is required to appoint an Industry Committee for each industry. [Section 5(a)]. This Committee shall recommend such reasonable classifications within the industry as it determines to be necessary within the purposes of the Act. As the word "define" requires a fixing of limits, so the making of classifications requires the drawing of lines within these limits. The subdivisions could not be made until the whole had been ascertained, so the action of the Committee could proceed only after a definition of the industry. But the making of the definition could not await Committee action because the Administrator was required to have "due regard" for the location of the industry in the selection of the Committee, and the employers and employees were each to have equal representation [Section 5 (f)]. The Committee itself is given no power to say whom it represents, and this question had to be settled before its members could be selected.

It is probably with reference to the duty of the Committee to make classifications that the greatest prejudice to petitioners appears. As soon as the Committee had completed its organization and had been plunged into the fog of definition troubles at its December, 1938 meeting, it was confronted with Dr. Murchison, President of the Cotton Textile Institute, who undertook to speak for the entire Cotton Textile Industry, who told the Committee that the industry was opposed to classifications. (R. 1087). Dr. Murchison, much relied on by the Administrator, told the Committee that it could succeed in its task only to the degree that it made the application of its recommendation uniform and simple, and that making classifications was a task of overwhelming di-

mensions. That this was in line with the Administrator's plan to avoid classifications is further attested by the fact that the Administrator admitted that "the demarcation problem between wool and other textiles was fully recognized at the time the appointment of Industry Committees for the textile industries was first considered." That he accomplished his purpose of avoiding classifications by perverting the Committee action and appropriating its power to himself, is shown by the further statement that:

> "I believe this line of demarcation avoids conferring competitive advantage upon either the woolen industry under Industry Committee No. 1A, or the textile branches under the jurisdiction of Industry Committee No. 1. (R-1738)"

Note that the competitive advantage issue is one of the matters upon which the Administrator was not empowered to act except on a recommendation of classifications and wages therefor by the Industry Committee.

By this unauthorized procedure, the Committee was prevented from ever giving consideration to the matter most vital to these petitioners. In consequence, the non-partisan members of the Committee having first-hand knowledge of conditions in the locality of the mills here represented, were the only ones to stand out against the recommendation as finally made. To say that these petitioners have not been prejudiced is like saying that a convicted defendant has had a fair trial where evidence in his favor has been suppressed, the law has not been expounded, and the jury has been coerced to return its verdict.

C. The procedure of the Industry Committee was not in accordance with the requirements of the law.

As a condition precedent to his approval of the recommendation of this Industry Committee, the Administrator must determine affirmatively that the Committee's recom-

mendation was made in accordance with law—that the Committee proceeded to its recommendation in the manner contemplated by the statute which gave it birth.

The procedure of the Committee is set forth in Section 8 of the Act. It has a dual function to perform—to consider the industry as a whole, and to define and make recommendations concerning the classifications inside the industry which it finds are necessary to carry out the purpose and spirit of the Act.

Subdivision (b) of that Section requires that the Committee investigate its industry, and hear such witnesses as may be necessary or appropriate to enable it to perform its duties and functions under the Act. Having done this, it is the Committee's duty to recommend minimum wage rates which, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

The additional duty with respect to classifications is provided in Subdivision (c) of this Section, and has provisions a little more elaborate. In recommending such classifications the Committee is required to recommend *minima* which will not substantially curtail employment within the classification, nor give a competitive advantage to any group in the industry. In determining whether classifications should be made, and in making the classifications and fixing minimum wage rates, the Committee is admonished to consider "among other relevant factors" three in particular:

> "(1) Competitive conditions as affected by transportation, living and production costs;
>
> (2) the wages established for work of like or comparable character by collective labor agreements. . . . and

(3) the wages paid for work of like or comparable character. . . ."

The Administrator found that the Committee had done its duty in the above mentioned respects—realizing, apparently, that such a finding was jurisdictional to an effective order on his part. Before making this brief finding, however, the Administrator reiterated what he had intimated many times during the hearing—that he thought he could not properly consider evidence dealing with procedure before the Committee. (R. 277)

> "I am inclined to agree with counsel that this issue is not properly before me, and that the evidence should be stricken."

The brevity of his finding on this important phase of the Committee recommendation, as compared to his findings on other matters, leads to the inference that he must have given but scant consideration to what actually happened before the Committee.

Such a consideration gives importance to his opinion that he ought not in reality to consider the Committee's procedure. That conclusion of the Administrator is novel, indeed. The Committee was his creature; he could not act except upon its recommendation; it was incumbent on him to ascertain, by appropriate legal means, whether the Committee had done its duty before he approved its action. That is required by the very language of the statute as well as its whole spirit and purpose.

It is to be regretted that the Administrator felt so inclined to put the Committee procedure out of mind that he gave no insight into just what consideration he gave to their investigation and action. The duty is none the less incumbent on us, however, to examine the Committee's action with the care that the Administrator ought to have given in his examination of it.

Committee Meetings.

The journal kept by the Committee furnishes a fair insight into just what it did. After its appointment in September, the whole Committee had four meetings: October 11, December 14, March 21 and May 22. The first meeting was devoted, largely to getting acquainted with the Administrator, his counsel and staff, and in hearing general explanations and discussions about the duties of the Committee. It was decided to appoint a couple of Sub-Committees to handle various phases of the work, and this was done. It was then decided to invite various members of the industry to come before a further meeting of the Committee.

The second meeting was held, beginning December 14. Action was taken, on recommendation of sub-committees, having to do with efforts to define the textile industry, which had been committed to its study. Various witnesses appeared before the Committee, including some of the staff of the Administrator, representatives of the Cotton Textile Institute, representative of the Southwest Textile Manufacturers, two representatives of the C.I.O. and a consulting engineer produced by the Cotton Textile Institute. At this meeting a sub-committee ("D") was appointed to study the matter of a minimum wage to be recommended.

The Committee's next meeting was March 21, and the first order of business was a short address by Administrator Andrews, in which he expresssd the hope that the Committee might bring its work to a prompt conclusion by the adoption of a wage recommendation at this meeting. It does not appear that any evidence was heard at this meeting, except a statement by the chief economist for the economic section, in which he explained some data brought before the Committee. This meeting adopted by a thirteen to six vote, a motion to recommend a 32½ cent minimum wage, and ap-

pointed a committee to draft the report setting forth this recommendation. This work was subsequently committed to Messrs. Pitts and Tolles of the Administrator's Staff. (R. 1723).

At the next and last meeting (May 22), it adopted the report of the Committee appointed to draft the report of Industry Committee No. 1, and passed a resolution declaring against differentials.

History of Minimum Wage Resolution.

The matter of minimum wage recommendation did not receive consideration at the first meeting of the Committee. At the second meeting it was not considered as such, but certain evidence was heard. It will be recalled that the first meeting decided to invite certain persons and associations to come before the main Committee and its Sub-Committees. In view of the sharp sectional issue which formed the basis of most of the testimony and discussion before the Committee, it is interesting to analyze the invitation sent out by the Committee to persons to come before it (R. 130-8). According to the names appearing with the Committee's report, 113 persons or associations were invited to attend from the North, of which 55 were from New York City; 13 were invited to appear from the South, 5 each being from Georgia and the Carolinas, and one each from Tennessee, Mississippi and Texas.

The list of those actually appearing before the Committee and Sub-Committees (R. pp. 138-52) is likewise instructive. There were 179 appearances from the North and 21 from the South. As indicated in this appendix to the Committee's report, only a small proportion of those appearing actually had anything to say. Of those appearing from the South, 11 were from the Carolinas (8 of these being accounted for by

the attendance of representatives of American Cotton Manufacturers Association), 3 from Georgia, 2 from Tennessee and 5 from Texas.

Substantially all the discussion before the full Committee and the Sub-committees turned around the cotton industry. The cotton-growing States, having about 75% of the industry and more than 90% of the employees affected by the wage recommendation, received something more than 10% of recognition from the Committée in the way of invitations, and produced something over 12% of the witnesses.

Of those invited and appearing from the South, all were connected with the large mills of the Carolinas and Georgia, except those representing the industry in Texas, Arkansas and Oklahoma. The small mill group, to which the petitioner and the Mills intervening belong, received only one invitation and had no representation. The one invitation brought forth a letter requesting a differential, but no consideration was given to this request and no action taken with respect to it. Whatever claim the mills of Mississippi might have was summarily dismissed (R. 113); only 2,683 employees being involved, and the proportion to the whole industry being "relatively small".

Sub-Committee "D".

This Sub-committee was appointed to study the matter of recommendation of a minimum wage, and it had two meetings—one January 24, and the other March 21. The first order of business at the initial meeting seems to have been to reprimand one of the staff of the Administrator for what some of the members of the Committee thought to be an improper speech recently made by said member, giving his opinion of what the effect of a 40 cent minimum would be.

At the same meeting Mr. Nelson, the Chairman of the general Committee, suggested that he felt that certain other data should be assembled, and that marginal mill operators should be invited to appear before the Committee and discuss the effect of wage orders on their employment situation. That is an interesting sidelight, in consideration of the fact that none of the so-called "marginal mills" were ever called before the Committee.

On March 1-2 this sub-committee met again and went into executive session. A straw vote was taken to ascertain how the members felt about a minimum wage recommendation, and this resulted in 2 votes for 25 cents, 2 for 30 cents, 2 for 32½ and 2 for 40. (R. 1717)

Finally, it was moved that the Sub-committee recommend to the General Committee that a minimum wage of 30 cents be recommended. This was carried by a vote of 4 to 3. Later, however, one of the employee members arrived and the chairman decided to take another vote, which resulted in a dead-lock, which the chairman broke by casting his ballot against the 30 cent minimum. Thereafter, the Committee voted on three other recommended *minima*, and they all lost. Incidentally, a motion to suggest a minimum wage of 32½ cents was offered, but there was no second. The employee representatives suggested a 40 cent minimum and all three voted for it, but they were the only ones.

Finally, this Sub-committee (D), which had been appointed to recommend a minimum wage, adjourned without having arrived at any recommendation and reported back (R. 1717) to the full Committee that it had been unable to reach a recommendation as to minimum wage.

Vote of Whole Committee on Recommended Minimum Wage.

Not daunted by the failure of its Sub-committee to come to any conclusion about what was a proper minimum wage—a circumstance which argues eloquently for the proposition that sufficient data had not been furnished the Committee to enable it to reach an intelligent decision—the whole Committee proceeded to vote on the subject. The minimum of 32½ cents was finally recommended by a vote of 13 to 6. The entire employee group of 7 voted for it. They had tried to get through a 40 cent minimum and had consistently advocated such a minimum. They were joined by three of the employer members from the North, and three of the public members. It will be noted that the recommendation was made, therefore, with the vote of a minority of the two groups, excluding the employee group. The vote—except for the employee group—was along entirely sectional lines, with one exception. (R. 1719)

Another matter entitled to great consideration is the fact that the recommendation was carried in part by the vote of the two new members of the Committee, who voted on it at the first meeting they attended, without having heard any evidence and without—as far as can be ascertained—having served on any Sub-committee. (R. 273) Certainly, as to these two, there had been no investigation, or hearing of evidence, such as the statute requires.

Report of Majority of Committee.

A brief glance at the majority and minority reports will give an accurate picture, between them, of what the Committee did, and what it failed to do. The majority report consists of deductions and subtle argument, rather than of facts. The majority report concedes (R. 70) that the Committee gave practically its entire time to a consideration of

the cotton industry (to the exclusion of rayon and silk), that the South contained about 75% of this industry, and that the average wage scale in the South was 36.6 cents per hour, as against 44.6 cents in the North; it was further conceded that the workers affected by the order in the South exceeded those in the North by more than 9 to 1. (R. 102)

The plain fact is that, although the Committee heard more than once from the Cotton Textile Institute, representing predominantly the North, and representatives of the large Mills in the Carolinas and Georgia, and from representatives of various other groups interested in the situation before the Committee, not one word was heard from any of those who, all conceded, would be the inevitable victims of this wage increase. It can not be stressed too many times that the position of the small mill group in the Deep South is entirely different from that of the mills in the North, and the large units on or near the Atlantic Seaboard in the South.

Nothing could be clearer, from a reading of the majority report, than that the majority of the Committee was interested alone in the industry as a whole, and did not concern itself with any individual mill or group or class of mills, if it seemed to represent a comparatively small segment of the industry.

A quotation from page 101 will illustrat what we have in mind. (R. 101)

> "A given minimum wage rate, therefore, may produce a relatively large increase in the wage bills of plants at the lower end of the scale of wage structures prevailing in the industry. However, the impact of a given rate on a given industry as a whole will be small, if the low wage plants should present a relatively small proportion of the total number of plants. The impact of any minimum wage that this Committee might recommend would be felt most keenly by the relatively small sector of the industry operating on the basis of very low wage standards."

The Committee's scarcely concealed desire to rid the industry of the marginal mills—forming the backbone, as they do, of the infant industry of the Deep South—is illustrated by statements on page 124 of the record:

> "The wage recommendation will have a fairly marked effect upon the relatively small group of low-wage mills that operate on the periphery of the industry. It is precisely this group of mills that tends to inaugurate competitive wage-cutting practices, thus exerting a depressing influence on general wage standards for hundreds of thousands of workers whose livelihood depends upon the functioning of one of the oldest industries created by man. The recommended minimum wage will provide a measure of protection for the great bulk of mills, South and North, against a type of production that is injurious to the industry and its workers, and ultimately to the community as a whole."

The word "unduly", in the last quotation but one, takes on rather an added significance here. The last quotation palpably contemplates that this "relatively small group" will be forced to commit involuntary suicide, with the result that the "great bulk of mills" will be protected against their competition. Therein lies the gist of their whole argument and this whole proceeding. This group of small Southern mills, taking advantage of favorable climatic conditions and being content to hire more workers at less wages than the large units situated near the consuming centers furnish a type of competition which is at the root of a great deal of what is being done in the name of the workers.

One singular attitude of the majoritiy report recurs quite often—particularly with regard to freight rates. It seems to be recognized (R. 114, for example) that freight rates do work manifest injustice to parts of the Country, and that they ought to be taken account of. The magnitude of the task, however, scares the Committee away from attempting to solve it. Finally, (R. 120) the Committee is kind enough to suggest that this evident wrong might be righted

if the small mill group would quit pursuing the matter before the Committee and take their case to the Interstate Commerce Commission. (R. 120)

Committee Must Give Notice of Hearing, and Institute Investigations.

A concluding admission which seems to cast doubt upon the entire concept of duty animating the majority is contained in the sentence at the top of page 125:

> "It further concluded that the data did not warrant any regional classification. The Committee's determinations as to classification were made after weighing the evidence before it, in the light of Section 8(c) of the Act."

That seems to be but another way of saying that the Committee did not have anything adequate before it for intelligent action—a fact abundantly shown by the Minority Report and our comments with respect to it. What it did have before it was made up in large part of biased showings by interested parties (Pp. 38-9 *supra*). Such a situation was the inevitable result of the construction placed on the statute and his duties by the Administrator who took the position that no notice of Committee hearings was required—and, undisputedly, no notice of such hearings was given.

That attitude conforms neither to the terms of the Statute nor the requirements of procedural due process. The statute provides [Sec. 8(g)]:

> "Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons."

By the same section (8), provision is made for the Industry Committee to

> ". . . hear such witnesses and receive such evidence as may be necessary or appropriate to enable the Committee to perform its duties and functions under this chapter."

The duty is further imposed on the Administrator by Section 5(d) to bring witnesses before the Committee and on the Committee to hear other witnesses of its own choosing. All of this, as well as the whole purpose and genius of the statute, contemplates a "hearing" by the Committee; and the use of the broad term "any", in providing for notice, carries the logical inference that notice of committee hearings was requisite.

In fact, the only other hearing mentioned in the section is that before the Administrator. If notice of that hearing alone were required, the use of the term "any" is meaningless. It will be observed that the obligation to give notice applies not alone to hearings "required" by the act, but to "hearings provided for in this section". Could it possibly be, under any interpretation of the act, that committee hearings are not "provided for" in the act?

Aside from the clear terms of the statute, some reasonable notice of committee hearings would be required by due process of law as applied to procedure. The statute has running throughout its terms the thought that whatever action might be taken should represent a judgment arrived at after a full and fair hearing of all interested parties. The Committee recognized this when it decided to send out invitations to those it conceived to be interested. But such selective action on its part would not dispense with the notice of the character which the law requires.

It will be noted also, that the Committee took the equally untenable position that it had performed its full duty when it considered the data before it—that the burden rested on the interested parties to bring their respective problems and claims before the Committee. It resulted from this attitude and the failure to give notice of hearings that the cause of the Small Mill Group was not presented to the Committee.

The fact is that the whole Committee had but one hearing at which the factors essential to a determination of the

questions before it were considered. Perhaps this is attributable to the fact that it was functioning under some compulsion by the Administrator—as to which a journal entry (R. 1716) is significant:

> "The meeting opened with a short address by Administrator Andrews, in which he thanked the Committee for the work it had done and was doing, and expressed the hope that a conclusion of the Committee's work might be reached through the adoption of a wage recommendation at this meeting."

Just what the Administrator said cannot be found among the records of proceedings, which, up to that point, seems to have been quite complete. Perhaps the succeeding entry by the keeper of this chronicle carries the explanation:

> "At the conclusion of Mr. Andrews' address, a motion was made, seconded and carried, that the further proceedings of the Committee at this meeting would not be reported by stenographic transcript, and the stenographers left the meeting."

Thus was unbecoming haste urged, at a time when scarcely five months' experience had been had under a 25 cent minimum, toward the adoption of an increase of more than 30% therein, in furtherance of a course which the majority of the Committee itself seemed to recognize meant naked tragedy to a minority group of mill owners, in which their employees and the communities where they lived would be forced to share. Can it be contended that the Committee proceeded according to law when no notice of its meeting was given, it heard almost exclusively from the competitors of petitioners and discontinued, at a most vital time, the record of its proceedings, which alone would advise petitioners of the facts most important to the preservation and assertion of their rights?

—*Minority Report.*

The minority members of the Committee filed a report which is noteworthy for its clarity, its comprehensiveness and

its earnestness. Unlike the majority report, it analyzes, with commendable thoroughness, the evidence which actually came before the whole Committee, pointing out (R. 168 et seq) the instances wherein the Committee failed to hear adequate testimony, or to hear any testimony at all; and showing that, with respect to the matters concerning which evidence was actually heard, the evidence preponderated vastly against the Committee's findings.

If this Court will take the minority report and check it with the journal of what transpired before the Committee, and with the transcript of the evidence before it, the conclusion will be inescapable that the Committee did a hasty and very slip-shod job in connection with a very difficult and involved matter, and reached a conclusion based, not upon its investigation and the evidence before it, but upon the native predilections of the membership.

We feel constrained to quote an excerpt from one of the studies by an attache of the Wage and Hour Division, set out on page 182 of the record:

> "At least two-fifths of the spindles in place are nearly thirty years old and have been rendered obsolete. . . . In general, an equalization of wage scales will necessitate modernization of the more obsolete mills, or will result in a transference of business to higher-wage mills that are now partially idle because of competition from low-wage mills."

Coming, as it does, from the spokesman of the Labor Department—representing, to be sure, his opinion only, and not entitled to any compelling weight—this presents a rather startling picture. According to it, practically half of the mills in the industry contain equipment which requires more human beings to operate than the "more modern" mills, and the business of these so-called "obsolete" mills, if this wage order is approved, will be likely to leave them and go to the modern ones.

The minority report constitutes a devastating and unanswerable refutation of the skillful analysis and argument contained in the majority report. Surely, no fair minded person can but pause when six men of standing, character and ability, having heard everything the majority heard, feel thus unconvinced, and find themselves willing to issue such a stirring challenge to those whose co-laborers they are in a task so fraught with possible woe to countless human beings.

Particularly is this true when one recalls that the action of the majority results, in part, from the affirmative vote of two members who became participants in the Committee's activities only on the day they voted for this vital economic change; and that the majority report has the sanction of a majority of only one out of the three groups provided by Congress; that all the while the Committee labored under the handicap of misleading definitions of what they were considering; that the group which made the only real study of minimum wages (Committee D) was wholly unable to reach any conclusion at all; and that the group most likely to be adversely affected—the small mill group—was not heard from.

The earnestness of the opposition to the Committee's action and the fervency with which they set forth their opposition ought to give pause to any person who really wants the law to succeed.

The Administrator's finding that the Committee proceeded according to law;—that all of this constituted "due process" as defined by this Act, and as understood by the average man to be every man's inheritance under our Constitutional system—is not sustained by any substantial evidence in this record. In fact, the whole proceeding is condemned by the recent decisions of this Court.

D. Due Process of Law Applied to Procedure.

In the decisions in the Morgan cases the Supreme Court of the United States has in recent years established a strict rule of procedure for the government of administrative officers engaged in hearings which have such an important effect on the daily lives of the citizenship:

Morgan v. United States, 298 U. S. 468; 80 L. Ed. 1288.

Morgan v. United States, 304 U. S. 1; 82 L. Ed. 1129.

These two decisions were made in the same case and represent two appearance of it in the Supreme Court. They involved hearings under the auspices of the Secretary of Agriculture relating to certain rates applicable in the stockyards. The first time the Court reversed a holding of a three-Judge court because that court had stricken from the record allegations to the effect that there had been procedural defects when the matter was presented to the examiner, having to do with notice, filing of exceptions and the like.

The case was heard a second time by the District Court and the Supreme Court reversed its judgment again because of the lack of procedural observance mainly on the part of the Secretary of Agriculture, himself.[5]

The language of the court in that opinion applies with unusual force here and points the way to the procedural requirements without which the committee's action and the administrator's order are ineffective.

We quote from the opinion on the latter appearanec *supra;*

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative actions and that in administrative proceed-

[5]Petition for rehearing was denied, 304 U. S. 23; 82 L. Ed. 1135. But see *United States v. Morgan,* 307 U. S. 182; 83 L. Ed. 1211, in which the proper course of further proceedings was indicated.

> ings of a quasi-judicial character the liberty and property of the citizens shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' —essential alike to the legal validity of the administrative regulations and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'."

Commenting on the fact that "no brief was at any time filed by the government." the court said:

> "But 'a full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command."

Another quotation from that opinion describes the standards to which such bearing must conform:

> "Congress, in requiring 'a full hearing', had regard to judicial standards, . . . with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. . . .
>
> The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. . . . These multiplying agencies. . . . must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

A brief quotation from the opinion on the first hearing will be helpful here.—

> "There must be evidence adequate to support pertinent and necessary findings of facts. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which are to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusions. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. . . .
>
> The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraenous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument."

These ringing words may well be quoted in challenging the procedure of the administrator and his committee. Tested in the light of their spirit and content, the procedure here before the courts fails miserably to measure up. The entire proceeding contemplated by the statute must be considered in determining whether due process was accorded these litigants. The two proceedings—one before the committee and one before the administrator—constitute one integrated whole. They are not separate or independent in any sense. The administrator cannot initiate anything and the committee cannot conclude anything. Each is corrollary of the other. Neither makes sense nor functions without the supplementing action of the other. The court therefore will have to look to the entire proceedings as a whole to see if the fundamental requirements of due process—"the inexorable safeguard of rudimentary requirements of fair play"—have been observed.

This court will be diligent to see that this first step in the enforcement of a contested wage order under this revolutionary legislation is carried to a conclusion in an atmosphere of patience of leisureliness of conscientious and painstaking study and of fair play. In doing that this court is bound to bring this proceeding under the condemnation of the *Morgan* cases. See also *Ohio Bell v. Public Commission*, 301 U. S. 292; 81 L. Ed. 1093.

Errors of Procedure.

Without rehashing the argument let us bring together an epitome of the action of the committee and the administrator. How can the geographical distribution of the committee be squared with these standards—particularly as it relates to the public group, the only disinterested group which could be counted upon to umpire the conflicting claims of the others? Under no possible rule of consideration could it be concluded that the South was not entitled to a majority of this committee ranging from 55 to 88 per cent. Yet we find it having a clear minority both of this group, of the labor group and of the committee as a whole.

No notice whatever was given of the committee hearings and when, finally, in the midst of the proceedings, informal invitations were sent out, the South received a little more than ten per cent of this recognition and the small mill group received far less than one per cent—notwithstanding everyone knew from the outset that here is where the blow would fall. In connection with the one lone invitation issued, to the small mill group or any one in it, we call the court's attention to the fact that the Mississippi Textile Manufacturer's Association sent an urgent letter dated December 14, 1938 to the secretary of the committee, explaining conditions in Mississippi and asking special treatment. (R. 155).[6] We quote a part of one of the paragraphs in that letter.

[6]Appendix to Transcript of Hearings Before Industry Committee No. 1, Vol. IV., pp. 428-31.

"We most earnestly request that you send a representative to this state to check into points enumerated above and satisfy himself that this does exist and also that the people in this state who have been gotten off the farms where they were making considerably less than they are being paid in the mills are more or less satisfied to make the wages that they have been paid and we find in a large number of instances that where their wages are increased, they only work part time and the result is we have a large labor turnover. We would appreciate your advice as to the above point when you have considered our requests for differential and advise whether we may expect to have this investigation made before increase is made in wages to apply to Mississippi."

The committee in its report (R. 113) refers to this request for differential but makes no disposition of it one way or the other. Notwithstanding the pendency of this request the administrator paid no attention at all to it. It is noteworthy also that the investigation of Mississippi conditions so urgently requested by the Mississippi association was completely ignored by the committee. As an interested party, this association was entitled to a finding by the Administrator with respect to its request for differential.

The court will not fail to take note of the fact also that the employees affected by this order—90% of whom were from the South—had no representation at all among the labor representatives of the committee. Five out of the seven members of the employee end of the committee were from the National labor organization having a negligibly small representation in the South.

The failure of the administrator seasonably to define the industry this committee was selected to investigate was a fatal procedural defect. Without such a definition, the com-

mittee had no yardstick at all. Their situation would be similar to an attempt to try a law suit without pleadings.

The committee gave no adequate or fair consideration to the questions before it, particularly, with respect to differentials. As far as we are able to ascertain from the record, the matter of differentials had no consideration at all at the hands of the committee until the day on which action was taken and then the committee acted at the rather urgent request of the counsel for the committee. The matter of classification was not referred to a subcommittee for study as was done in the case of the minimum wage itself. The truth is that the committee was rushed to its conclusion in a precipitate way and finally the administrator himself appeared before it and expressed the hope that it would conclude its duties by making its recommendation at that meeting.

That all factors were not considered by the committee, which the statute prescribes should be considered, and that some of them were given only scant and inadequate consideration clearly appears from the minority report. Surely if that great a portion of the committee felt so keenly that their labors ought not to be concluded and that the committee ough to be furnished further data, the orderly disposition of business in a dignified and judicial way would have demanded that some consideration be given to their attitude. We submit that this vigorous and challenging report by the minority, is bound to give pause to any disinterested person who sits in judgment on the committee action and make him wonder if, in truth and in fact, this whole proceedings was not rushed to such an extent that the result must be considered abortive.

The court will not fail to recall also that two of the members of the committee—one of them of the public group —voted both on minimum wage recommendation and on classifications at the first meeting they attended. Certainly Con-

gress contemplated that the committee—that is, the whole committee—should investigate the matter entrusted to their charge and should hear witnesses before they should vote on any proposition. If that should not be done, any recommendation which the committee might make would necessarily express the individual predilections of the membership rather than a calm and dispassionate judgment arrived at after investigation and full hearing.

The Court will also consider the attitude expressed by the committee and by the administrator that the burden rested upon those seeking them to request differentials. If their attitudes as to that was wrong, the whole proceedings from the definition through the administrator's report is void. In that connection we remind the court that the whole genius of the act is that the committee itself is required to survey the industry; and the duty to make classifications or to arrive at a deliberate judgment not to make them is specially imposed on them by the statute. It was not contemplated that any region or any group or any person should be required to seek out the committee and claim a differential. The committee had full power to investigate records, subpoena witnesses and conduct any hearings they thought proper to perform the duty laid by the law on them—not on those seeking differentials. This one default is sufficient to require condemnation of this entire action.

Procedural Errors Before Administrator.

This same callousness to procedural requirements persisted in the Administrator's hearing. If the court will examine his findings and report in detail, it will find that he based it almost entirely on the investigation made by his subordinates and the testimony they sought to give. This domination of the inquiry by the members of his staff went to the point where one of them was on the committee to draft the committee's report and—since it is obviously the work of a statistician—evidently wrote the report. The similarity of

treatment and of language in the administrator's findings to those found in the committee's report and to the testimony given by this same employee of the Wage and Hour Division, point to the conclusion that he must have had considerable to do with the composition of the administrator's report.

The attitude of the committee in the hearing before the administrator was improper. The committee was a fact-finding body and was supposed to be fair and disinterested. It had no duty to perform with respect to the hearing before the administrator. The committee was certainly not a party in interest. It could never be justified in assuming the role of a partisan. There was no more justification in the committee's appearing before the administrator as an interested party than there would be for a master to pursue his report before a court and work strongly for its acceptance.

Not only did the committee introduce as its main witness in the hearing against the request of the small mill group for a differential, a witness so partisan that he referred to Southern industry as "carpetbagger" (R. 712); but counsel for the committee assumed the role of such a protagonist that a minority member of the committee had to ask the administrator to take steps to take care of the minority (still members of the committee); only to have counsel state dogmatically that he appeared only for the majority of the committee which alone he assumed to be his client. (R. 887-8-9)

This is not conduct one should expect to find in a committee, being a coordinate part of the fact-finding machinery for determining the truth concerning the textile industry. Those whose duty it is to seek out and report only the truth have no right to embark on such partisanship. That is not the fair hearing which due process contemplates.

On the subject of procedure, we direct the court's attention to the exclusion by the administrator (R. 821, et seq.) of some quite relevant evidence sought to be obtained by subpoena on behalf of some of the objectors to the recom-

mended minimum wage. Effort was made to obtain a subpoena directed to the labor unions whose representatives constituted the entire membership of the employee group of the committee. This was quite important proof as these representatives essayed to speak for the laborers in the Southern mills which were practically the only ones to be affected by the wage order. The object of the subpoena was particularly to find out the extent to which, if any, these labor organizations had locals in Southern cotton mills. If they did not have any or if their connection with Southern mills were infinitesimally small, this ought to have been admitted so that this court might determine how fair the administrator was in the appointment of the members of this committee. The exclusion of this testimony was prejudicial error. These unions were exceedingly active in this case, their attorneys appearing and examining all witnesses and offering testimony and engaging quite actively in the whole proceedings.

We next call attention to the affidavit of W. Gordon McKelvey (R. 12-16) from which it will be seen that the administrator acted with unnecessary haste with the result that the Southern mill group was not given a chance to present its case with the particularity and detail it desired. The court will bear in mind that this group had not been invited to Washington at all—with the exception of the Mississippi association which asked an investigation which was never made. According to McKelvey's affidavit, the administrator first indicated that opportunity would be given to collect the information necessary to present this small mill group's case and to get the witnesses to testify to it. He decided rather suddenly, however, that he could not remain in Atlanta for the hearing and the result was that this group had only a few weeks to collect its evidence. After a couple of days for the presenting of their evidence, the administrator "announced bluntly" that he would go back to Washington for the hearing. McKelvey, representing this small mill group, had made

his arrangements to get the witnesses to attend at Atlanta and did not know of the plans to return to Washington and was unable to get them to go to Washington to testify.

The showing of the Southern small mill group, convincing as it was could have been much more complete if the administrator had not been in such a hurry. Opposing counsel did not fail to make the point when examining Mrs. Mager. She testified that her investigation covered only about 25% of this small mill group and considerable capital was made of this fact. We submit that, in a matter so vital to these small mills and their employees, the administrator should not have been in such haste and should have accorded the requested right to be heard.

All of that we submit comes under the direct condemnation of the *Morgan* cases. This Court was careful there to point out that if these government bureaus and functionaries are to be invested with such broad powers and are to hold the confidence of the public so necessary to their perpetuation, they must act with tender regard for the rights the average American has grown to feel he will be accorded by his government.

Instead of doing that, the Administrator has from the start demonstrated a desire to get this thing hurried through in the shortest possible space of time. He has failed to follow the specific mandates of the statute about the appointment of the Committee, defining its duties, leaving it free to function according to its own desires, and has sought to exercise an influence and control over it which neither the statute nor the fundamental rules of fair play will sanction.

He admitted, and based his findings on, testimony which a court of law or of equity would not admit, and if admitted, would not place much reliance on, because based on pure hearsay. He accepted the ipse dixit of the attaches of his De-

partment as to every material matter in the case, and rejected the overwhelming evidence of the petitioners. Throughout he failed to act according to the standards this Court has established in the Morgan cases in such definite and vigorous language.

POINT II

THE ADMINISTRATOR'S FINDINGS WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Under this heading the sufficiency of the evidence, heard and introduced on the public hearing held by the Administrator, to support the findings and conclusions (R. 259 et seq.) on which the wage order is based, is brought into question. An analysis of these findings requires a recognition made by the Administrator himself (R. 278 et seq.) that the proposition before him was three-fold, in that it required a consideration of the effect of his proposed order upon the industry as a whole, the Southern branch of the industry, and the small mill group of the Deep South.

Before undertaking to project the findings of the Administrator against the background of the evidence, it is well to note at this point the kind of evidence relied on by him. The Administrator seemed to feel at liberty to admit any and every sort of evidence into this record, which, with the exhibits, will probably amount to more than 6000 pages. The provision of the Fair Labor Standards Act in this respect (29 U. S. C. A., Sec. 210) is that:

> ". . . such courts shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive."

The nearest and most recent parallel provision with reference to evidence before an administrative tribunal is the provision of the Wagner Act [29 U. S. C. A., 160 (e)]; however, it should be noted that the Wagner Act provided that "in any such proceeding, the rules of evidence prevailing in courts of law or equity shall not be controlling". No such provision appears in the Fair Labor Standards Act.

A. The Wage Order Is Void Because The Administrator's Findings that the Proposed Minimum will Not Substantially Curtail Employment, or Give A Competitive Advantage to Any Group, Is Not Supported By Substantial Evidence.

A recent decision of this Court likened the duty of the Court in passing on an Administrative finding to that which should govern a trial court in weighing the evidence to determine whether a jury should be permitted to pass on the issues of fact arising out of the evidence. We quote from the language of Mr. Justice Stone in that opinion . . . *National Labor Relations Board v. Columbian, etc. Co.*, 306 U. S. 292, 300; 83 L. Ed. 660, 665:

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197; 83 L. Ed. 126. . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury . . ."

It will probably be helpful to set out a brief quotation from two Supreme Court cases cited in support of the language above used, taken from the pages respectively referred to in the opinion:

". . . many decisions of this Court establish that, in every case, it is the duty of the Judge to direct a verdict in favor of one of the parties when the testimony, and all the inferences which the jury could justifiably draw therefrom, would be insufficient to support a different finding." *Baltimore and O. R. Co. v. Groeger,* 266 U. S. 521, 524; 69 L. Ed. 419, 422.

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'" *Gunning v. Cooley,* 281 U. S. 90, 94; 74 L. Ed. 720, 724.

It is evident that the court below would have excluded from its consideration the material contained in Industry Committee No. 1, Exhibit No. 1, Bulletin 663, of the Bureau of Labor Statistics and other similar documentary evidence on the authority of *National Labor Relations Board v. Bell Oil & Gas Company* (5 Cir.), 98 F. 2d, 406, had it not been for the implications flowing from the action of this court in reversing the holding of the Fifth Circuit in the case of *National Labor Relations Board v. Waterman Steamship Corporation,* 309 U. S. 206; 60 Sup. Ct. 493; 85 L. Ed. ..... In the *Bell Oil & Gas Company* case the Fifth Circuit was at great pains to analyze the former holdings of this court as to what constituted substantial evidence, reviewing the earlier decisions in the light of the more recent holdings.

Bulletin Six Six Three.

Fundamentally, the findings and report of the Administrator are based very largely on the factual data set out in Bulletin Six Six Three of the Bureau of Labor Statistics.

(R. 1751). It is hard to conceive of the basis on which it is considered that this bulletin is competent evidence. It appears from the record that this bulletin was a compilation which was the handiwork of A. F. Henrichs, Chief Economist of the Bureau of Labor Statistics (R. 392). At the time of the trial, Mr. Henrichs was in Europe and it was necessary to try to bolster up his treatise by the testimony of others.

It was shown that Jacob Perlman, Chief of the Division of Wage and Hour Statistics, had charge of assembling these statistical data which Mr. Henrichs used in the compilation of his treatise. According to him, the Labor Department had procured data from about 20% of the cotton textile mills in the United States (R. 393). The method of doing this was to send field workers out to various mills and, where they were found cooperative, to investigate their payrolls and take from them such data as was desired. No compulsion was possible and data was gotten only from those mills who chose to cooperate (R. 395).

That was done in the year 1937 and, in order to bring the tables up to date, questionnaires were sent out to the mills and the information received through them was combined with that theretofore received, so as to produce the composite result on which the Government relied (R. 394). No offer at all was made to vouch for the accuracy of any of the processes, either of assembling, or of compiling or of recording the data thus obtained, and the farthest effort in that direction was that Mr. Perlman stated that he "believed" (R. 395) they were correct.

Mr. Tolles, the Assistant Chief Economist of the Wage and Hour Division, testified that he had collaborated to some extent in compiling the data for Mr. Henrichs. He, too, failed entirely to vouch for the accuracy or the authenticity of the figures which he sought to place in statistical

formation; the farthest he went was to state (R. 397, 400, 401) that he "believed" that the data was correct and accurate, and that the studies were appropriate for the purposes sought to be served by him. We quote one statement (R. 400)—

"I believe it very appropriate for that purpose."

A further method pursued by him (R. 418) was to go himself, or to send others, around to talk with buyers of cotton mill products and ask them what effect they thought a raise in minimum wage, or some other factor thought to be pertinent, would have on prices at which merchandise would sell. His "belief" was based on what they told him, along with what the mill men told the representatives who called on them, plus what the mill men, presumably, wrote to the Labor Department in response to questionnaires sent out to them.

We repeat that we cannot conceive the theory under which our adversaries will expect to have the Court sustain the admission in evidence and consideration by the Administrator of this Gallup Poll type of evidence, an unsworn, uncertified, unauthenticated compendium of figures, presumably made by people whose efficiency or accuracy is not vouched for, and analyzed by a man who was not present; which was offered to establish the basic facts underlying the findings and report of the Administrator. The Court could dispose of this whole case by merely holding that this bulletin was and is not competent evidence.

See *South Alabama Co. v. Commissioner Int. Rev.* (5 Cir. 1939) 104 F. 2d 27, where the Court ruled out a soil survey with infirmities less condemning than bulletins such as this. See also *Morris v. Harmer*, 7 Peters 554; 8 L. Ed. 781.

Despite its clear incompetency, we will, of course, have to proceed with a discussion of it, together with all the other evidence before the Administrator, so as not to be in default, in event the Court should hold it to be admissible. We shall not omit, however, comment on the weight of such evidence.

Effect of Minimum Wage Recommendation on Employment.

The Administrator spends a number of pages (R. 278-284) analyzing the prospective effect of the 32½ cent minimum on labor costs, and, therefore, manufacturing costs, both in the nation as a whole and in the South, adverting also to the recognized fact that when the minimum is raised the wages above the minimum have to step up also. This discussion seems to have been based entirely on Bulletin Six six three and the comments on it by various members of the economic section of the Wage and Hour Division. Not a single witness testified to any facts relating to any mill, or any group of mills, and no single witness testified that any specific mills could or could not stand the increase, or what the effect would be on the wage costs. The nearest approach to any direct testimony was that Mr. Tolles hazarded his customary "belief" that no appreciable raise of wages would result. The Administrator contented himself with adopting the construction placed on Bulletin six six three by the witnesses in the Wage and Hour Section and accepted their conclusions *in toto*. It will be noted that, in every single instance, the figures given were nothing more than averages and no effort was made to indicate which mills were consulted to arrive at these averages, or whether the petitioner, or any of these interveners, had ever been interviewed, or whether their situation was reflected in the figures or not. They were simply abstract averages.

Not to be completely without human testimony to back up these unconvincing abstractions, however, the Administrator finally located a witness who, he thought, gave testi-

mony which might not be so entirely against his findings. (R. 286) This witness, Mr. Jones, operating a mill in North Carolina, not much troubled by the freight differential, with a capacity considerably beyond that of the small mill group, finally admitted that he thought he might possibly survive the 32½ cent raise by practically rebuilding his mill and getting rid of 75 out of his 600 employees. That was merely a hope, because he had been losing money since 1937.

The Administrator must have conceived his duty to sound in technical terms, indeed, if he found comfort in testimony like that. Probably he was alone in his comfort. It seems quite likely that the mill owner who had to mortgage his plant to restock it with machinery, and the 75 employees —one out of every 8—reduced to the bread line, would feel that they had paid quite dear a price in order that a few sweepers, janitors and unskilled laborers might have their wages stepped up an average of 4½ cents an hour, so that they might receive probably twice the wage they could make in any other calling in the community. The Administrator was able to hold out a ray of hope, however, because he found one witness (R. 287) who hazarded the hope that these discharged employees would not be consigned to permanent unemployment, because of his thought that jobs would be "provided for the displaced employees elsewhere."

It might be said, in passing, that the quotation from one witness, (R. 288-9) who estimated that more than twelve million spindles were in various stages of obsolescence ought to be sufficient to throw a scare into the most hearty. This is about 54 percent of the industry. It seems to be conceded that those mills which will have to fade out of the picture are those termed "obsolescent" or "marginal". Let it not be forgotten that these terms mean that their machinery is not efficient enough to produce cotton goods with a minimum of

human labor. That is the only objection ever offered to it. Evidently, the Administrator feels that when he puts in jeopardy that many spindles he is not risking substantial unemployment.

One is struck, as he goes along through the record, at the use of the subjunctive; such expressions are found as "if the price structure of the cotton textile industry continues to improve . . ."; "a portion of the increase may be absorbed . . ." ". . . a small investment may make a high rate of return". Findings of so vital a nature cannot be permitted to rest on "ifs" and "mays".

Petitioner's Testimony.

In contrast with the wholly unsatisfactory nature of the proof on which the Administrator, in his report, bases his findings, consider the testimony of some of the witnesses for the petitioners. Mr. Mizell, President of the petitioner, was operating a mill built in 1921—a small mill of slightly more than 16,000 spindles. Although he had kept this mill in a high state of modernization by spending from $30,000.00 to $50,000.00 each year on it, his mill had shown a net loss during a stated six months period since the 25 cent minimum wage went into effect, of $16,485.32.

He was President of the Micolas Cotton Mill, also, a slightly newer and smaller mill, which showed almost the same net loss. There was not the slightest doubt about the effect that this 32½ cent minimum wage would have on his mills (R. 1388):

> "For the above reason, we state positively that our mills cannot operate successfully under the 32½ cent minimum wage law proposed, unless the mills spend an enormous sum for improvement."

Mr. Mizell further testified (R. 1393) that he did not know whether financial assistance could be obtained for putting in the improvements necessary, and stated, further:

> ". . . therefore, an investment of around $1,500,000 is threatened with destruction and the jobs of 552 people are hanging in the balance, and if the improvements are finally made by our mills, 106 people will be denied further employment. . . . There are no other industries to take up any people denied employment at our mills."

This is illustrative of the fate threatened by this minimum wage, to virtually the entire small mill group; and the tragedy is heightened, in this instance, by the fact that these mills are the industrial backbone of a flourishing little town in Alabama of about 3000 people; built by local people to give employment to local citizens, all working happily together in an arrangement giving mutual satisfaction to all; and, yet, these industries must fold up, and this community go on relief, because the Administrator is better satisfied with abstract figures, given by men who never saw the inside of a cotton mill, than be is with positive testimony of men who have spent their lives wrestling with the live problems of their operation.

Mr. R. D. Sanders, President of two of the intervenors, operating five cotton mills located, largely, in small towns in Mississippi—and constituting the main cotton mill industry of that State—gave similar testimony (R. 1572 et seq.). These companies showed a large loss during the last period for which figures were available, and if the 32½ cent minimum had been in effect during the first four months of 1939, the wage bill would have been increased 18.6%, ($44,497.84) not counting the raises which would have been oc-

casioned in the higher wage brackets. The condition staring these mills in the face was not a theory, but a stern reality (R. 1574):

> "The companies are having great difficulty in continuing their operations under present business conditions at the present wage scales, and if such scales are increased to a minimum of 32½ cents per hour, these companies, under present market conditions, will certainly be forced to cease operating their mills."

Mr. Miller, operating three small mills in Texas, and President, (R. 55) of the Southern Cotton Manufacturers Association, one of the intervenors, found himself [illegible] with a similar situation. He explained the handicaps under which these Mills were operating, called attention to the fact that Texas is the largest cotton growing State, showed pointedly that the vast multitude of cotton mill workers in the South were not members of one of the two National Unions from which the employee members were chosen, and had no representation at all on the Committee; and described, in graphic language, what would happen to his mills, and the Texas mills, generally, if this minimum were adopted, (R. 1442, 1440):

> "Well, if we had to pay 32½ cents minimum, which means a corresponding increase in the higher brackets, and our competitors in the large-size mills in the North and East have the same minimum, with their advantages over us, with reference particularly to cost of freight, we cannot compete with them. . . .
>
> "I will make the definite and positive statement that, if the Fair Labor Standards Act is enforced according to the recommendation of the majority of the Committee, without a differential, and the freight discriminations are not removed, there will not be a cotton mill operating in Texas at the end of five years."

Mr. M. M. Bryan painted the same picture with reference to the small mills in Georgia. He was President and General Manager of three mills located, respectively, at Jefferson, Crawford and Royston, Georgia, and built about 1900, 1906 and 1929, respectively. The total employees were about 850 people. He told in detail (R. 429 et seq.) of the very real handicaps under which small mills in the South operated in competition with the mills of the East, and the large mills generally, and gave it as his opinion that many of the small mills would be forced to close down. The result, as far as his mills was concerned, was thus expressed by him (R. 1432):

> "Therefore, any order increasing the minimum pay is much more far-reaching with us than it would be with others. If this proposed minimum of 32½ cents becomes effective, this branch of our business must be entirely closed. . . .
>
> "Such action would be not only unwise, but insanely brutal. It would stifle the plant and render idle and dependent all of its employees. I believe the condition described above is the condition which exists in many other small plants. Surely the adoption of a minimum of 32½ cents would cause many, many plants to entirely cease operating, and throw many operatives, together with their families, entirely without means of support."

Mr. E. H. Morris, Jr., operated a typical mill of this group (R. 1401 et seq.). The citizens of Geneva, Alabama, a typical small town of that State, conceived the idea, about 1923, that the community needed an industry. They raised $250,000.00 and built a cotton mill plant employing 251 people. It was kept entirely modern, more than $150,000.00 having been put in improvements in the last two or three years.

A steady loss in operation had been experienced ever since the 25 cent minimum went into effect. It was his judgment that there was no reason for the mill to install any new machinery, because it was already modernized, and before he got the new machinery in, he thought it would be considered by some obsolete. The labor working in this mill came largely from the farm, and, under the average wage of a little less than 28 cents, they were making from two to three times what they could make on the farm. The situation of that mill was thus summed up by him (R. 1402):

> "Therefore, the mill cannot operate successfully paying the minimum wage of 32½ cents per hour. . . . If the 32½ cent wage rate is put into effect, it will cause the unemployment of 251 operatives, also all office employees and superintendents."

The testimony of Mr. Paul A. Redmond gives a most interesting account of the experiences of the ten small mills operated in ten small Alabama towns under his leadership. He gives a full and interesting picture of the population of the communities where these mills operate, the kinds of employment people generally engage in and the wages they receive, and the average wage of a little less than 31 cents an hour furnished far greater remuneration than others similarly engaged received in these communities.

This Company had lost, in about five months—operating under the 25 cent minimum—a little over $50,000.00, and if the 32½ cent minimum had been in effect during that same period the loss would have been $131,586.87. This minimum wage would cause an increase of nearly 13% in wages, not counting the advance which would be required to those already making above the minimum—recognized by all as a considerable sum. These mills were as modern as more than 50% of the cotton mills in the United States, and a detailed

survey of what would be required to install additional labor-saving machinery, aggregated $541,500.00. There was considerable doubt about the companies' ability to finance these improvements, and if they did, 140 employees would have to be dropped from the payrolls.

It was interesting to note that well over one-third of the families represented in these mills owned automobiles, about two-thirds owned radios, more than half owned electric refrigerators, and the scale of living was quite high, indeed. We quote (R. 1645) Mr. Redmond's conclusion as to the effect the suggested minimum would have on his operations:

> "The 32½ cents per hour will increase our labor costs substantially more than the minimum of 30 cents per hour, and I can see no reasonable basis for any expectation of a sufficient improvement in market conditions to make it possible for us to continue to operate, if the recommended 32½ cents minimum is ordered into effect by the Administrator."

Expert Testimony.

We hesitate to draw out this discussion by the small mill men further, because the evidence above set out was wholly undisputed and will serve to show the general trend of the testimony of every small mill man who took the stand.

We cannot, however, omit a brief reference to the testimony (R. 1645 et seq.) of Mrs. Margaret Mager, a research consultant and statistician, who worked up the case of the Small Mill Group. While a great deal of the testimony of Mrs. Mager was based on hearsay, and not, therefore, the legitimate subject of consideration by the Administrator or of comment here; it is thought to be proper to advert to her testimony, insofar as she analyzed the figures furnished by the Committee and also those set forth in the majority re-

ports. It is submitted, also, that her testimony is of far more value than the experts who sought to testify for the Committee, because she was and had been in constant touch with the small mill owners, had a first-hand acquaintance with, and knowledge of, their mills and problems, and was able to give the Court the benefit of her knowledge and experience, in addition to her analytical powers as an expert.

According to Mrs. Mager (R. 1468) there were 537 mills in the South having spindles of 25,000 or less—the generally accepted definition of a Small Mill. The small mills predominated heavily in the South, whereas larger units were the rule in the Carolinas and the East. This Small Mill Group represented 31% of the whole industry and were located in 319 scattered communities in the South. Two hundred fifty nine of them were located in communities of less than 2500 inhabitants. Almost always the mill located in such a community furnished the chief source of employment to its citizenship. The removal of this Small Mill Group from the textile picture, or its serious crippling, would tend inevitably toward the worst sort of monopoly, and would have a tendency to destroy the competition so necessary for health in any industry. It was the inevitable tendency of the application of a minimum wage like the one recommended to crush the smaller units and to concentrate their business in the hands of the larger units. The 25 cent minimum wage had caused a payroll increase in the Small Mill Group of 8.4% and twenty-eight mills, employing more that 5000 workers, had been forced to close their doors. (R. 1473-4)

Mrs. Mager showed clearly (R. 1475 *et seq.*) the difference in characteristics and means of livelihood of the Southern population, and the many other factors which made the problem of the Small Mill Group separate alike from the problems of the mills of the East and of the large units of the Carolinas

and North Georgia. As a result of Mrs. Mager's contacts with the Small Mill Group and her knowledge of their situation and her investigation of their affairs, she had ascertained that at least 20% of them had indicated that they could not operate under the 32½ cent minimum, and this brought about an estimate that at least 20,000 to 25,000 Southern mill workers—located in the small towns furnishing the backbone of the South—would be forced back to the farms, or into unemployment, if the wage order should be put into effect.

Administrator Evidently Agreed with This.

A reading of the carefully worded conclusion of the Administrator (R. 301-19) will show that there was a definite undercurrent in his mind which made him apprehensive that his order was going to be fatal to at least a substantial part of the Southern industry. We invite the Court's attention to that while we analyze it, briefly. While concluding (R. 301) that no investigation of his could "produce an exact numerical prediction" of the results of his order, he admitted —in making his findings of the effect on the peculiarly situated small mills of the South—that the minimum wage would have "its greatest effect on certain mills in the South," and that "a number of them may be compelled to make readjustments in production methods, independently of this wage order."

He went on further (R. 309) to hold out the hope that the South could find the means to install labor-saving machinery, and to find that their apprehension that the Government would not loan them the money to make these improvements (R. 313) was "not convincing."

It is apparent that the Administrator was wholly unable to discover any testimony which would refute the overwhelming showing of the Small Mill Group that they were facing

disaster. The only witness he could locate who gave any testimony tending, in the slightest degree, in that direction was Mr. H. L. Battle, who managed a mill in North Carolina. An examination of his testimony (R. 553 et seq.) will show that there were essential points of difference between his mills and those of the Small Mill Group. In the first place, he had nearly double the number of spindles over the maximum of the Small Mill Group; he was located in North Carolina, many hundreds of miles nearer the Eastern markets, with a much more favorable freight rate; he already had such a high average wage that the increase to take place upon the application of the 32½ cent minimum was negligible. His was a carded yarn mill—not a factory for the making of woven goods—and his mill had already been entirely modernized. His mill was, in no sense, typical of the small mill of the Deep South such as the Court is now dealing with.

Failing entirely to find any basis for a finding of fact at variance with the showing of the Small Mill Group, the Administrator was driven to interpret the law in such a way as to make it permissible to sustain the recommended increase, even though it worked annihilation to the Small Mill Group. We quote from page 309 of the Record—adding a quotation from page 313:

> "A group of cotton textile mills in the South, which operate plants containing less than 25,000 spindles, entered objection on their own behalf to the approval of the Industry Committee's recommendation. Under the Act, the consideration of the wage order must be made on an industry basis. . . . nor is it permissible to disapprove a minimum wage recommendation, because of the effect the recommended rate may have on particular mills.

> The application of the small Southern mills is here considered from the standpoint of whether the minimum wage will result in any substantial dislocation of employment in the industry. . . .
>
> I find that no substantial dislocation of employment in the cotton textile industry will result. . . ."

It is perfectly clear, from this conclusion, that all the Administrator did was to relate the number and size of the victimized Southern mills to the whole industry, and conclude that they were not enough to be "substantial". While he does not indicate the percentage of the mills which will be forced to close, or the number of employees working in them, he does concede definitely that the blow will fall hardest on them and that a certain percentage of them will be forced to close. He simply concludes that it is not (R. 309) "permissible to disapprove a minimum wage recommendation because of the effect the recommended rate may have on particular mills."

He did not challenge or dispute in any way the testimony of Mrs. Mager or the mill-owners themselves about the extent of the mill closing and unemployment which would result in the affected area. The testimony of the mill men showed that the overwhelming majority of the small mills would not be able to operate under this wage order. That testimony was not challenged or questioned in any way. There simply wasn't any testimony on the other side of the question, and the Administrator, had no alternative save to accept it as true. Apparently, he did this, and conceded the correctness of the unemployment as estimated by the witnesses for this small mill group.

The finding and conclusion of the Administrator is legally inadequate, in that he does not find that substantial unemployment will not be occasioned in the Small Mill Group.

Having accorded the Small Mill Group separate presentation, and spent most of his time considering their problems, and having properly set up this group as a separate segment and accorded it separate treatment throughout his report, (for example see Record 278, 302, 303, 309) he specifically omits any finding to the effect that the recommendation of the Committee as to this group is supported by the evidence at the hearing or that it will "carry out the purposes of this section" insofar as it relates to substantial curtailment of employment. Such a finding is jurisdictional, and its absence is fatal to any valid order—See

Florida v. U. S., 282 U. S. 194, 208; 51 S. Ct. 119; 75 L. Ed. 291.

Panama v. Ryan, 293 U. S. 388; 55 S. Ct. 241, 79 L. Ed. 440.

Administrator's Interpretation Unconstitutional.

Thus is brought sharply before the Court the question of whether the Administrator has interpreted the Act in consonance with the Constitution of the United States. Put in other words, this Court is called upon to decide whether the Administrator, is defining "substantial"—as the Congress, on whom the duty to define it rested did not—in any way which can be consistent with the Act and with the fundamental law of the land. We will not digress to argue the law at any length at this point—that being assigned to another part of the brief. It is a matter of stern fact, however, that such a construction carries with it real tragedy to these petitioners and the communities they serve and the employees working with them. As far as the parties to this suit are concerned, they can get but scant comfort out of the finding that the level of the industry may be raised in the North, and that competition will be removed from the large units in the seaboard States of the South so that they may

become larger. That may present a pretty picture to those who are the recipients of this bounty at the hands of the Committee and the Administrator. The picture contains nothing but blackness, however, for those whose property is taken, out of which this bounty may be fashioned for those who need it least.

It is submitted that the Administrator's finding on this point does not recite the requisite jurisdictional facts and that it is not supported by any substantial evidence—there being not even a scintilla.

B. The finding of the Administrator that the Minimum Wage should be Uniform—without Classifications—is not supported by Substantial Evidence, and is Contrary to Law.

Section 8, (c) dealing with classifications proceeds on a definite assumption that classifications shall be made. The first words in this paragraph seem to be mandatory and unequivocal in their import:

> "The Industry Committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate. . . .

It is true that towards the last of the paragraph—obscure alike in position and in emphasis—the right is given to the Industry Committee to omit classifications. Reading that section by its four corners, however, in the light of its setting in the act, one is driven to the inevitable thought that Congress intended classifications.

South Always Given Differentials.

Let us look briefly at the history of the manner in which the South has been dealt with in that respect since the Civil war. Since the setback resulting from that cataclysm and, in

apparent recognition of unequal tariff policies towards it, and, in acknowledgment of the perfectly obvious handicaps imposed by distance from markets and the like, the entire nation has always evinced a readiness to try to compensate, through differentials, in some measure for those handicaps. Consider a few.

(a) Universal differences in wage structure.

Natural economic processes has established a generally lower rate of pay in the South to all laborers, skilled and unskilled. There was no dispute about that. See, for example, testimony of Shepard (R. 1238), Mager (R. 1480-4), Adamson (R. 1309). As illustrative of the general difference, it will be found from the table appearing on page 1476 of the record that the wage rate for farm labor varied from $2.72 a day in New England to $1.02 a day in the central South. There is a differential established by nature of more than two and one half to one.

(b) Differential established by government.

The Government itself in all of its branches, has universally dealt with the South in definite recognition of a differential in wage scales. Let us examine two or three instances of this:

(1) N. R. A. wages.

The N. R. A. is referred to at length in the Administrator's report as furnishing something of a similar problem to the one before the Court. The cotton textile workers were given, under the N. R. A., exactly the same differential the Small Mill Group is contending for here—2½ cents. In fact, under the N. R. A. there were 410 different codes, each having differentials and the textile code alone was subjected to over forty classifications involving differentials. (R. 1239). If the prototype to which the Administrator is wont to refer

is to be taken as a criterion, the failure of the Administrator to break up this industry into its natural classifications taxes ones credulity.

(2) Social Security payments.

Here, again, we find a definite recognition of differences in economic status which the government feels requires differentials. They vary from an average per recipient of $8.71 in Kentucky up to $17.04 in Michigan and $22.58 for Ohio—with the South taking the short end of the deal each time (R. 1477).

(3) Government contract payments (Walsh-Healy Act).

Under this act the Government requires all persons bidding on Government contracts to observe wage rates prescribed by the Labor Department. Consider the tables found on page 1479 of the record. In every instance the South is lower than the rest of the country. This varies as much as 35% in some industries, like iron and steel, where the South receives a wage of 45 cents, while the remaining States get 62½ cents. In promulgating that table of wages (R. 1479) the acting Secretary of Labor gave the reason for this differential as follows:

> "This Southern area historically constitutes a well defined geographical area, and the prevailing wages in this area, as shown by the evidence in the record, supports the conclusion that the entire group of Southern States should be treated as one locality for the purpose of the present proceeding."

This definite finding of the head of the Department under which Administrator Andrews served, made in the year 1939, makes a more eloquent argument than we would be capable of presenting.

(4) W. P. A. wage scale.

In other parts of his report, the Administrator seems to rely upon the findings and actions of the Works Progress Administration. Consistency would demand that he give attentive ear to what they are doing, and always have been doing about the payment of their workers. At the time of the hearing, the W.P.A. was paying its unskilled workers in the South from $26.00 to $32.00 a month, while it was paying those in the North $40.00 and more. The average hourly earnings in the South were 29.2 cents, while in the North the average was 55.7 cents (R. 1240, 1477, 1478). As justification for these wide variations, Harry L. Hopkins, Esquire, then Director of the W. P. A., gave his statement (Ib.):

> "The schedule of monthly security wages provides for variation in the monthly rate of pay. . . . for workers in different sections of the country in accordance with differences in general wage levels and costs of living. . . ."

This variation of pay in recognition of these same factors persists up to the present time, as witness the new wage scale of the W. P. A. issued about the time this order of the Administrator was promulgated (R. 17-24). Under it, unskilled workers in towns under 5000 are paid $31.20 per month in the South, $39.00 per month in New England and $44.20 per month in parts of the West. The differential there is about 25% between the South and New England.

Thus does it appear, without contradiction, that, in all phases of Government activity, the South is recognized as *sui generis*—as a region set apart—and differentials are established accordingly.

(c) Labor contracts.

Outstanding contracts between organized labor unions and employers universally recognize differentials between

the North and the South and between various areas in both regions (R. 340-1).

(d) Existing wage scales in cotton industry.

The average wage paid cotton mill workers in the South at the time the act was passed was 36.6 per cent, while the average for the North was 44.6 percent, a differential of between twenty and twenty-five percent. At the same time, the average wage paid in the Small Mill Group was 28.6%, a differential of more than twenty-five percent below the South generally and more than 50% below the North. (R. 1234, 1237, 1307, 1482, 1493).

Congress Intended Classifications (Differentials).

It will be kept in mind that Congress had before it at the time it enacted this law the picture above set out. It took differentials for granted. It had before it a universal history of the granting of differentials—of the making of classifications. Nature had established differentials, the labor unions recognized them, the Government applied them universally, and nobody ever thought their necessity could be denied. The textile industry—the one most persistently in the public mind—had in it well defined and well established and well recognized differentials. In that state of the case, and with that background Congress set about to provide machinery for stepping up statutory *minima* with whatever speed the industries could assimilate without economic indigestion. Naturally, classifications were in the mind of Congress.

How could Congress have possibly had anything else in mind? Was not a co-ordinate branch of the Government (Walsh-Healy), at that moment, recognizing classifications as between South and North; wasn't the same true of the W. P. A.? Didn't well recognized classifications already exist in the textile industry? Was it thinkable that anybody would

consider flying in the face of experience in so precipitate a manner, when Congress had indicated its definite feeling about classifications?

It is impossible to conceive that the members of Congress from the South would ever have permitted the age-old recognition of classifications to be put aside, except with the definite conviction that the policies then existing and bearing the stamp of approval of logic and tradition would be continued unabated? Any one who lived through the times when the wage and hour bill was passed certainly would never doubt the answer to that question. One Congress found itself unable to pass a companion act at all, and every one knows that the present one would never have gotten through without the definite provision for classifications, and the definite conviction that no one would ever be put in a place of responsibility who was willing to turn his back so completely on the manifest purposes of the act.

There is a definite principle of law which governs the interpretation of contracts, as well as of statutes: Their intent is to be gleaned from what was written, interpreted in the light of the circumstances of the parties existing at the time the writing was executed.

The statement of Governor Hugh White, of Mississippi, is illustrative of the state of mind above referred to. After quoting the words of Administrator Andrews:

> "Allowance for these proposals was done by providing in the law that, in the determination of wage orders, consideration shall be given such factors as transportation, production, living costs," (R. 1041)—

he gave expression to the attitude of the country which forms the background against which this act must be projected in determining what it means (R. 1044)—

"To do less [that is, fail to grant differentials] would be to admit to the Southern States that the confidence manifested by their assistance in passing the Act had been betrayed, that in its operation the Act is no longer the act of the national Congress, but the act of Industry Committee No. 1 and that under arbitrary maladministration the South is not to be accepted as a partner to the industry of the nation, but a colonial step-child, not even permitted to process and manufacture its own greatest crop."

With this background and these pertinent and proper considerations in mind, let us proceed to an analysis of the Administrator's findings with respect to classifications.

Analysis of Administrator's Finding on Differentials.

The Administrator refers more than once (see, for instance R. 320) to the proposition that no one appeared from the Small Mill Group, or even from the South, to ask the Committee for a differential. That is, indeed, a unique position. No notice of the Committee hearings were given, no subpoenas were issued to any of the Small Mill Group and, as far as aught appears to the contrary, this group was pursuing the even tenor of its way trying to operate cotton mills successfully under very adverse conditions, and knowing nothing of what was transpiring with the Committee.

Surely, the Administrator would not take the position that he can convene his Committee in Washington, rush them through a series of perfunctory hearings, to which none of the group so vitally interested in what he is trying to do is invited, and then shut them off from complaint because they did not come and ask that which it was the Committee's duty to give them without asking. There never was a moment when the Administrator did not know, through his experts, that the group really to be affected by a raising of the statutory minimum was this group of Southern mills. Every one knew

that and, certainly, the Administrator knew it. While the employees of his division were issuing invitations to come before the Committee to 113 persons in the North, fairness would certainly demand that he do his best to get some attendance from the Deep South, where he knew his wage order, when issued, would work the greatest hardship (R. 130 et seq.). Having pursued the policy he did with respect to invitations, the repeated animadversion on the failure of the petitioner, and the others involved, to ask a differential, does not come with very good grace.

It is mentioned, also (R. 320 and other places) that the Southwest (Texas, Oklahoma, Arkansas) mills made a showing for a differential and a motion was made in the Committee to grant one, which could muster only one vote. The evident implication is that differentials didn't seem to get far in the Committee.

This circumstance does not give rise to that conclusion at all except superficially. The fact is that the Southwest was doubtless entitled to a differential. The question of differentials could not be handled, however, in any such piecemeal fashion. Any classification which might be contemplated would have to take account of all of the industry affected. The classification then under consideration was one which was in favor of the Southwest as against the rest of the Deep South, as well as the Carolinas and the North. The Southwest would not have wanted such a result as that to be reached. It was obviously proper for the Committee, in that state of the record, to turn its back on any classification which took into consideration that one isolated segment of the industry.

If the Committee had been animated with a sincere desire to cover the field assigned to it in an adequate way, it would have taken up the claims of the Southwest, called in the remainder of the Deep South, the Carolinas and the other

parts of the industry, and invited a general expression and discussion on the subject of classifications. The Committee, however, did not initiate anything of the sort. It sat by and did nothing. Not even appointing a sub-committee to study the important matter of differentials. Hardly a pair of pages of the chronicle of its proceedings contains any mention of classifications. The requested action with respect to the Southwest was rejected, perhaps, because it did not give any adequate treatment to the question of classifications as a whole.

North did not want Differentials.

The Administrator next (R. 320, 321) stresses the fact that Dr. Murchison, of the Cotton Textile Institute, expressly disavowed any desire for differentials on the part of the industry. Surely the Administrator did not think there was anything strange about that. The group represented by Dr. Murchison (Eastern Group) was not interested in any differential. The average wage among his clients was above 44 cents. Certainly, he was not interested in differentials. His were the manufacturers getting the cream from the industry. They labored under no handicaps. Differentials could not possibly serve their ends, but, on the other hand, would necessarily be aimed at them.

The Administrator (Ib.) also attached evident significance to the fact that the president of the American Cotton Manufacturers Association was present and did not raise a voice of protest at Dr. Murchison's statement. There is nothing peculiar about that, either. Neither is that association, or the mills primarily represented by it, (the large mills of the Carolinas, Virginia, etc.) here protesting the action of the Administrator. The circumstances thus detailed by the Administrator further exemplify what was evidently quite manifest to all concerned—that the Small Mill Group were

the victims of a "squeeze-play" at the hands of those whose problem of merchandising would be much simplified if the uncontrollable competition of the Small Mill Group might be eliminated.

One is bound to admit that it is obvious that the large mill group, whether in the East, or along the Atlantic Seaboard in the South, does not need a differential so long as the minimum does not exceed 32½ cents. The picture cannot be held accurately in mind if one forgets that this Small Mill Group of the Deep South had an average wage of only 28.6 cents when this law went into effect, as against 36.6 cents for the South as a whole. The wage scale of the large mill group in the eastern part of the South, therefore, is bound to have been well above that.

To see the picture in this light is but to accept the situation as it is bound to exist. No one can dispute the facts of geography. To the extent that the large mills are removed from the Eastern markets, they labor under a handicap. To the extent that the Small Mill Group of the Deep South lies farther away from the centers of distribution, they labor under that much greater handicap. Add to this the further differentials of size, untrained labor supply, cost of living, etc. and any fairminded person is bound to see that the first effort will result in a freeze-out of those laboring under the greatest handicap, and that this process can be pursued progressively until only those favored as the Northern segment is now favored can survive.

Living Costs.

On this exceedingly vital factor, in determining the question of differentials *vel non*, the Administrator was content to rely, exclusively, on one piece of evidence, clearly inadmissible and of little probative force if entitled to be received; we refer to Exhibit 10 of Industry Committee No. 1,

(R. 1921) being a mimeographed bulletin, marked on the back "Confidential—Cost of Living". Let it be borne constantly in mind that this was all the proof the Administrator had on this subject except that furnished by petitioners.

Here, again, one wonders how this perfectly informal, unauthenticated document can have any possible probative force in a Court of law. It is subject to all of the weaknesses Bulletin six six three had, and, in addition to that, it is based in part on certain information gathered by the W.P.A. (See page 1 of this exhibit) Shades of Blackstone and of Greenleaf and of Wigmore! Has the time come when it will be seriously contended that data gathered by the proverbially inefficient methods of the W.P.A.—*forgetting that self-interest in each community would stimulate workers to boost* the cost of living to the farthest possible point—can be transmitted by some unknown means to somebody connected with the Labor Department, and that somebody else connected with the Labor Department can make some mail-order-house investigation and, after the information has been thus gathered and passed through a series of hands, some person having no knowledge whatever of the situation, and not qualifying as an expert in the matter at hand, gathers it together—can it be possible that any one will seriously contend that this ought to be admitted as competent evidence in a court? The content of this bulletin is so obscure, and the testimony about it so lacking in definiteness, that it is hard to gather just what were the sources of the conclusions Mr. Tolles (R. 451-4) attempted to reach. One gathers from his testimony, and the questions asked by the attorneys seeking to sustain the Committee's recommendation, that this study took no account whatever of what folks actually ate, but concerned itself, rather, with what the Bureau thought they ought to eat.

Under that concept, it would not do for a cotton mill worker, living near the banks of the Tombigbee in Alabama, to have a preference for catfish when the Bureau, taking a survey of what the folks eat in other sections, has decided that he ought to have caviar instead; it would be too bad for a strapping Mississippi weaver to have a weakness for black-eyed peas when the Bureau thought that Boston baked beans is the sort of diet a man ought to have; a man would not qualify for inclusion in the statistics if he preferred cabbage to Brussel sprouts, mustard salad to broccoli, or a good strip of "fat and lean" to the more delicate "Swift's Premium".

There was a great deal of loose talk in the record about the people in the Deep South not getting the right sort of food. That talk came, very largely, from folks who had never been south of Washington. It goes without saying that if one considers standard products like breakfast foods, canned salmon, Kansas City meats and the like, inquiry would disclose that they probably sell for more at a corner grocery store in the South than they do in the North or West, where they are put up. That results from the freight differential under which the South labors. The manufacturer generally fixes the price of his product, and he must add to that the freight to the place where it is to be consumed.

What of the situation, however, if some sections of the country have developed a home economy which enables them to get just as many calories, or vitamins, or whatever other unit of measurement one may decide upon, from food which can be bought at his own doorstep at a fraction of the price? Would the Bureau rule those folks out and condemn them to the absolute necessity of living on Kansas City beef and canned beans? Of course, the whole thing reduces itself to an absurdity.

Professor Adamson pointed all of that out (R. 1301-5). His testimony, largely hearsay, would hardly be adverted to but for the example set by our adversaries who depend almost entirely on hearsay. He did have the advantage of living in Alabama and of having some knowledge of and contact with, the people so readily talked about by folks who had no knowledge whatever of them, and who considered them only as so many specimens appearing on a statistical table.

Petitioners Proof on Cost of Living.

The evidence of the petitioners did not stop there, however. They made an overwhelming showing about what it actually costs to live in the small towns of the South. Witness the testimony of Mr. Mizell, President of the petitioner, (R. 1392)—

> "I will state that living conditions in our section are from 20 percent to 50 percent cheaper than living conditions in the North. We charge our renters only $4.00 per month for a four room house, with free water, and our employees are living under better living conditions than they ever enjoyed in their lives until they came to our cotton mill village... . ."

Probably more directly to the point is the testimony of Mr. Redmond, who had an intimate first-hand knowledge of prices and conditions in the 10 small towns where his mills operated in the State of Alabama (R. 1642). His employees bought eggs at 17 cents a dozen, butter at 20 cents a pound, milk at 10 cents, or less, friers at 15 to 20 cents a pound, and fresh vegetables all at about one half the price prevailing in the cities only a stone's throw away. What would the statisticians say about that? Would they be satisfied with a diet of eggs, fried chicken, milk, butter and an abundance of fresh vegetables to be had at the front door? Will they turn

down evidence like that because it doesn't happen to fit into the exigencies of the requirements of a statistical column?

Would they consider the cities they sought to size up in the South as properly representative of the towns of 2500 where these mills were located—and would they be surprised that the prices in these rural communities did not exceed much more than half those maintaining in some of the cities? Of course, they would like to reject all that. They are trained to deal, not with human beings, but with figures of ink. They know nothing of individuals, and can see only standards, classes and averages.

Would those who are wont to rely so completely on their numbered bulletins like to go further and find from Mr. Sanders (R. 1566, 1570, 1571, 1574) that price ranges in agricultural Mississippi run even less than that—and would they be convinced if they were told on authority that these folks who get such ecstatic delight out of sitting down to a meal of turnipgreens with just plenty of "sow belly" floating around in it, with some home-grown chitterlings and a quart or two of milk and some "long sweetening" on the side, really have attained a quite good measure of health and physical stature? If so, let them look at page 1578 et seq. of the record and see the state of health of that part of this country characterized by Professor Nixon as "Health Problem No. 1". Out of the nearly 1400 cotton mill workers examined at these mills, not a single case of pellagra, hookworm, malaria, or typhoid was found, and no history of the first two—and the result as to tuberculosis showed only a negligible percentage of that.

A similar situation is revealed by Mr. Bryan's testimony (R. 1434), or that of Mr. Burow (R. 931-2), Mr. Arnold (R. 1025), Mr. Miller (R. 1438) and Mrs. Mager (R. 1480-2). Now, all of this evidence is undisputed. Every single witness

who had the slightest knowledge about what is cost actually to live in the South testified to the same thing—that it costs about half to live in these cotton mill towns of what it costs to live in the North generally and in a great many of the cities of the South.

In all seriousness, would any one think for a moment that the sort of "canned" information which came from nowhere and proved nothing tangible could be accepted by the Administrator in preference to all of this direct evidence by people who actually know?

In the face of such a showing on the part of the only witnesses having any personal knowledge of the situation, how could the Administrator be justified in accepting such insubstantial evidence as the sole basis for his conclusion?

The Government Itself Gives the Answer.

Perhaps that question is well answered by the Government, itself, and by the very department whose statistics the Administrator relied on. If, in truth and in fact, it does cost as much to live in the South as it does in the North, why would the Secretary of Labor fix the wage scale on Government contracts from 15% to 35% less than in other areas, and assign as the reason for so doing the difference in cost of living? The tables and quotations referred to above show this to have been done about the same time the Administrator was issuing his order. (R. 1479)

If the W.P.A. found from its studies in Hattiesburg, Mississippi, and other cities, that it cost as much to live in the South as in the North, can any one explain why, pursuant to that bit of research, the W.P.A. proceeded to pay the laborers in the South wages sometimes averaging not much more than half those paid in the North for the same hours of work?

The fact is that all the proof shows, and without contradiction, that, under the factor of the cost of living, the South is entitled to a wage differential. The 28 cents an hour the Small Mill Group employees were receiving when this law went into effect, would buy them much more in the way of food and clothes and shelter than the 44 cents an hour their northern brethren received. Everybody accepts that but the Administrator, and he did not have any competent or substantial evidence to the contrary.

Transportation Costs.

The Administrator next (R. 326) takes up the matter of the effect of transportation costs on the competitive conditions which the Administrator was adjured to investigate and consider. This is in line with his duty as fixed by the statute. The Administrator adverts to the fact that quite a few people came before him to give testimony, but he seems to lay them to one side or the other with a dispassionate nonchalance. As in other matters, he seems to place major if not sole reliance on another bulletin. As in the other cases, the man who tells him what the bulletin means is Mr. Tolles. In this case, as in many others, the findings of the Administrator seem to be couched in practically identical language with the bulletins of Mr. Tolles and his testimony, giving rise to the inference that the Administrator must have found himself persuaded, in major part, by the testimony of Mr. Tolles.

This bulletin seems to be subject to the same infirmities as the others. It simply has no claim to a place in this record as far as this Court is concerned. The information about it is quite meager, contained largely on page 442 of the record. About all we know about it is that it was prepared by a man named Nathan Fine. The record affords but meager information about who Mr. Fine is, what his recommendations and accomplishments are, and how much of this bulletin

expresses his own knowledge, and how much he got by the hearsay route from others. As to Mr. Tolles, it is, of course, all hearsay.

The testimony of Mr. Tolles is subject to the added discount here that he was not a transportation expert. (R. 442) If he was not, the testimony he proceeded to give was a meaningless incumbrance of the record. It was the conclusions he gave which furnished, in words and in content, the basis for the Administrator's report. As against the unsatisfactory character of that testimony, the Administrator had before him the testimony of expert traffic men, thoroughly familiar with their subject, who had given their lives to an exclusive study of rate structures and the like. Their conclusions run at direct variance to those of Mr. Tolles and the Administrator. To this class belonged Mr. P. H. Johansen, a freight rate expert for many years, six of which had been spent exclusively in working on freight rates to and from textile mills. His conclusion is thus stated (R. 1155)—

> "The average rate from New England to all points, however, is 100.90 cents and the average rate from the South is 114.06 cents, or a disadvantage of 13.04 percent against the Southern mills."

The picture, as it affects the Southern region, takes on a much duller tone when one considers the populations reached by the New England mills as compared with the Southern mills. That picture is something like this (Ib.)—

> "More than fifteen million people are reached by New England mills at the rate advantage of more than 20 cents per 100 pounds. Slightly over two million people are reached by the Southern mills, with equal advantage."

This is a direct and unanswerable refutation of the Administrator's conclusion (R. 333) that Southern mills have advantages over Northern mills as to certain consuming centers.

There may be individual cases, but this ratio of more than 7 to 1 on a population basis must be considered as a background of all individual cases.

Another traffic expert, with eighteen years experience as traffic expert in Atlanta—Mr. L. O. Kimberly, Jr.—testified, using Atlanta as a basis point for the South and Boston for the North, and the result of his calculations were thus epitomized (R. 1113).

> "In other words, the present average rate from Atlanta is 129.4% of the average rate from Boston which results in the Southern mills having a transportation disadvantage of 29.4%, due to a combination of the distance disadvantage with the disadvantage of a higher level or rate per mile."

Mr. Kimberly gives testimony at direct variance with the Administrator's conclusion, with respect to Southern advantage on raw materials, thus summing up the situation (R. 1114).

> "The Southern mills do not have any compensating advantage in inbound rates on cotton to offset the higher transportation cost on the manufactured cotton products to the principal markets. . . . On all of the Western cotton, which must necessarily be used, or is more suitable than local cotton in the Southern mill territory for use in the manufacture of some types of fabric, the Eastern and New England mills have a transportation cost advantage by reason of lower rates in connection with the water route through the Gulf ports than the rates available to Southern mills. The combination of these inbound rates on the manufactured product gives the Eastern mills a substantial advantage."

The Court will bear in mind, too, that this testimony had to do with points on or near the Atlantic seaboard in the South. The handicap under which the mills in the Deep

South and the Southwest labor is, of course, proportionately much greater. Testimony of the individual mill owners (R. 1161-2, 1388-90, 1401, 1431, 1574-5) showed beyond peradventure from those who have actually to wrestle with the problem as one of the vexing aspects of their daily lives, that the freight rate differential was one of the real burdens under which it was impossible to travel on a basis of parity with the mills of the East and those more favorably situated on or near the Atlantic seaboard in the South. The added time consumed in getting goods to market was found also to be a very real handicap.

Consider also the statement of Harry Hopkins, Esq., then Secretary of Commerce as to freight rate discrimination in the South (R. 968).

> "Later the freight rate structure was planned to clinch the industrial supremacy of the North and East.
>
> It still stands and today's rate differentials penalize both southern railroads and southern shippers. Northern manufacturer have a rate advantage of about 30% over southern manufacturers who want to ship the same products into the rich and populous North and East. . . ."

This Court knows what everybody else knows about freight and freight rates—or it knows enough about them to know where the truth lies in a situation like this. This Court knows that a bolt of cloth cannot be hauled to New York as cheaply from Charlotte, North Carolina, as it can from New Bedford, Massachusetts, or as quickly. It knows, by the same token, that it costs more to transport a package of woven cloth from Opp, Alabama, to New York City than it does from Charlotte.

The Court knows, too, that the New England States comprise the vast bulk of all the industry of this country. The last census shows (R. 1243) that of the 3076 counties in the United States, 97 of them (3%) employ more than half of the wage earners of the United States. Of the 93 cities in the United States having over 100,000 population, more than half of them are in these 97 counties. A situation like that didn't just spring up by magic—didn't just happen. That is the product of the inexorable laws of economics—related somewhat to the facts of distance and geography.

This Court knows that the South—and particularly that part of it populated by this Small Mill Group—is largely agricultural, and that it is struggling heroically to bring about a more healthy balance with its agriculture by development of some industry.

The depressing effect of an overbalanced agriculture is well illustrated (R. 964) by a comparison between Ohio and Mississippi—the latter having a little the better of the area factor. Mississippi has relatively few industries and is very predominantly agricultural. The result is that the value of the products of Mississippi was a little less than a billion dollars, while those of Ohio—having a very fine balance between agriculture and industry—are valued at more than three billion dollars, or nearly 3½ times those of Mississippi.

This Court knows, from many sources, that a very earnest effort is being made to get the age-old handicap of the freight differential changed, so that the South may not be held forever under such a serious handicap.

This Court knows that, within the last year, the Interstate Commerce Commission has given the South its first ray of hope in many years by ordering the removal of some of the freight rate discriminations as to a limited number of prod-

ucts—not including textiles or anything used by or connected with them. The Administrator has turned his back on all of the substantial testimony on this score and has accepted the incompetent and wholly unconvincing testimony of Mr. Tolles. We submit that this finding lacks substantial evidence as its basis.

Production Costs.

The finding of the Administrator that the available credit to sustain a program of modernization for small mills to enable them to reduce their production costs, throws an interesting sidelight upon his analysis of the question before him. There was no contention that credit agencies were without funds to finance modernization. Neither was there any question that policies attempted by these agencies stifled modernization where the possibility of liquidation was readily apparent. The problem confronting the small mill owners in attempting to finance a program of modernization was shown to be that the more modernized mills could not be operated with a sufficient degree of efficiency to satisfy the credit agencies on the feasibility of the program.

It must be borne in mind that under the normal operation of free enterprise many small mills have already attempted modernization, and that some of these have proceeded with a reasonable degree of success, while others have met with failure. The problem of modernization for the small mill is inextricably bound up with the type of labor available and with the product manufactured by the operator, as well as the feasibility of the operation of small high wage units required to sell on distant markets. The Administrator evidently realized the complexity of the problem since he makes his finding as indefinite as language will permit. The Administrator says (R. 313):

> "The evidence in the record, offered to show that existing Governmental and private credit agencies are not in a position to finance sound modernization programs in textile mills, is not convincing."

He does not say that the agencies are not in position to finance unsound modernization. He does not say that modernization would be sound even if it would solve the problem of the small textile mills. He does not say that under either or both of these contingencies the credit agencies would finance the program. In fact, his finding is as irrelevant to the problem of these petitioners as was much of the other evidence before him. Modernization, like every other factor in our economic system, must be located in a favorable environment. A close parallel may be found in the production of raw cotton from the farm itself. In the comparatively level sections of Texas, experiencing small rainfall, land values are so high that modernization is a prerequisite to successful cotton farming. Here, one operator who does not produce from fifty to one hundred bales per year cannot long continue. In the Delta and black-belt sections of Arkansas, Mississippi, and Alabama, the productivity of the land permits smaller scale operation per unit of manpower. In the hill sections of these same states, the topography and productivity of the land demand a diversification which would spell ruin to an operator who undertook to produce more bales per unit of manpower than could be counted on the fingers.

It must not be supposed that every producer in the low rainfall section is better off than any producer in the bottom or black belt sections, nor that every producer in the bottom or black land sections is better off than any producer in the hill land sections. The element of land as a type and source of wealth dictates the manner and means of operation. The diversifying hill farmer has worked out an economy whereby he lives at home, requiring relatively little

cash outlay either for living or operating expenses. He is not as expert in the production of cotton as the bottom or black land operator for the reason that he is not a specialist, but devotes his principal efforts to the production of other types of wealth of equal if not greater importance to him than cotton or its counterpart, money. If suddenly transferred to a Texas cotton plantation, where mechanization has been developed to the fullest, he would not know how to begin the production of his crop.

With this in mind, it is interesting to notice that the Administrator found one sentence (R. 338) worthy of note, it being evident that his analysis proceeded from a background of knowledge confined to productive industry as foreign to the small mills of the South as to agricultural pursuits.

We refer to that where he states that the "loom manufacturers reported" something about the comparative purchases of new machinery. Here we have the Administrator basing his findings on a quite material matter on what one witness said he had heard that the loom manufacturers reported. If this eighty-five page finding of the Administrator should be stripped of references to and discussions of testimony of that incompetent and flimsy character, there would not be enough left of it to fill a half dozen pages.

All of that aside, however, the evidence was all one way as to the relative productivity of Southern labor in comparison with Northern labor. All agreed that this difference rested on training as affected by tradition and actual experience. The importance of this feature is sufficient to warrant the testimony of a few of these litigants on that subject. We quote first from Mr. Clarence R. Miller's testimony (R. 1441):

"The man power per thousand spindles for the operation of a small mill is much greater than the man power required for the operations of a large mill, due to the fact that in nearly every instance in a smaller mill the overseers and foremen for the various departments do not have a full job. The larger mill can pay a much higher wage than the small mill, and yet the per pound cost to the large mill would be substantially lower than the per pound cost to the smaller mill; and after all this actually represents the true cost of production."

Mr. Mizell (R. 1388, 1392) thus sums up his experience and knowledge on the subject:

"Our production costs are higher than large mill units, and the law requires that this be taken into consideration. . . ."

"For instance, our spinners operate from eight to ten sides to the spinner, whereas the spinners in the East operate from twelve to twenty sides per operator. Our weavers operate from forty-five to fifty looms, whereas the Northern weavers operate from eighty to one hundred twenty looms; and this same proportions extends throughout the mill, therefore, if we give employment to these people we cannot do so on the basis of wages paid by the Northern mills, and the law specifically states that transportation, living and production costs must be considered."

To the same effect is the testimony of Mr. Redmond (R. 1649):

"The operatives employed in our mills while probably having as great inherent capacity or ability as Northern operatives, because of lack of experience, they are of necessity not as skilled and efficient in their mill work as operatives employed by Northern mills, who have been doing cotton mill work all their lives."

Equally positive is Mr. Sanders, who stated that the people who work in the mills operated by him come from agricultural communities, quite a large number of them continuing to live on their farms. His summing up of the situation was as follows (R. 1576):

> "These people who work in our mills are people who have lived for generations right around that community, in that vicinity, and have not been imported in there from the large textile centers, and they come in and learn to work there; and they are not natural mechanics, and they do not run as many machines as the operatives do in the large textile centers, I might also say at this point that they are satisfied not to run such a large number of machines. . . . and when I try to urge them to run more machinery and get more pay therefor, they become dissatisfied and quit and go back to the farm."

Note his exposition of the situation as it appears on page 1582 of the record:

> "Well, I might say that owing to the very peculiar situation existing in Mississippi, due to the fact that it is almost entirely an agricultural state, I wrote a letter to the Administrator prior to the advent of this law at all, of the twenty-five cent minimum, asking that someone be sent to Mississippi to investigate conditions there, and see that no injustice was done to these people, because they are going to be put out of work and they won't have anything else to do if this is put into effect."

Incidentally, although Mr. Sanders stated he had made every effort to get the Administrator to have the Mississippi conditions investigated with the view of getting some relief in the way of differentials, or otherwise, no such investigation was made because, as the Administrator said, he did not have the funds.

Dr. Dyer gave a true picture of the situation in his usual fresh and vigorous style (R. 1067):

> "You go to New England where they have skilled labor and where they have been working one hundred years in this industry, and at least, they should be skilled, and there you find a certain wage scale for those skilled workers; and then you come down here to the South, with these little country towns, where they bring in the hill-billies that never saw a factory before and put them to work, they are not skilled laborers, but they do have sense of character, all right, and you say—in New England they pay $20.00 per week, and down in the South here, they are paying these poor fellows only $10.00 per week. You shout, 'Robbing them, robbing them.'"

Now, the evidence was all one way on that subject. Nobody denied that the Southern cotton mill operative of Alabama, Mississippi, Texas, etc., recruited from peoples accustomed for generations to the leisurely processes of those who till the soil, do not acquire the speed and efficiency of those mechanics who were born into the trade—in whose blood an aptitude for things requiring mechanical skill has run for generations. Indeed, nobody who knows the facts would attempt to deny it. Nor is the testimony of Carolina operatives (R. 339)—among the largest in the business—of any particular value. Doubtless, their labor migrates indiscriminately from Northern plant to Southern plant. At any rate conditions are wholly different, and this evindence has no probative value.

The Administrator may be satisfied with dismissing this vital and important matter with a hurried wave of his hand. If he had made the investigation Mr. Sanders asked him to make, or had accepted the evidence before him he would have followed the lead of his colaborers in the Government Service

—N.R.A., Walsh-Healy, W.P.A., and the like—and have recognized the true facts of the situation and granted a differential, so that these agricultural workers might be given a fair chance to develop themselves into industrial workers, and thus to balance the economy in the South so that, in due course of evolution, it may not be referred to as "Economic Problem No. 1."

Taxes as Costs.

The Administrator fails to make any satisfactory explanation of the matter of taxes, which he dismisses with a half page of discussion. No attention is paid to the burden of the Manufacturer's Sales Tax unique to the manufacturers of the South. Instead he contents himself with showing per capita tax rates in the South compared with the North. Presumably that includes income taxes. Such an array of figures could have no real probative force in determining how much the costs to a mill in a particular locality should be to produce cotton goods. Income taxes are paid only out of net profits. If the South has been able to score only a very low rating in that direction, it is only because it labors under such serious handicaps that its embryonic industry is not able as yet to help much to fill the coffers of the Government with net income. Per capita wealth and income tax payment go to show that the area where these are high is prosperous and hence purchases a lot of goods. They do not indicate cost of production in any individual unit.

The Administrator (R. 338) seemed to feel that he had scored a telling point when he set forth his finding to the effect that the per capita tax rate in the North almost doubled that in parts of the South. He referred to one source, and one source only, for this finding. An examination of the record will show that (R. 981-2) no witness said that at all, and that the only basis for this finding was a question by Committee's

Counsel, to which he was wholly unable to get any affirmative response from the witness.

Wage Agreements, Etc.

The Administrator seems to concede (R. 340-1) that whatever collective wage agreements there may be in the South contain lower *minima* than like agreements in the North. Though he concedes that, it does not influence or persuade him. The statute imposes the definite duty on him to consider this as a factor. The evident purpose of that is that his findings as to it will lead him to the judgment the law requires him to make. He cannot arrive at that judgment arbitrarily or capriciously. If he finds from his consideration of this mandatory factor that collective bargaining agreements do establish wage differentials as between the South and the North; to that extent, he must be persuaded towards the conclusion that he ought to do likewise (*Morgan v. U. S.* supra). He repudiates the statute when he recognizes that one of the factors he is bound to consider points towards a certain conclusion, and then arbitrarily fails to give it the weight the statute contemplates.

As to wage levels established by those who follow stanards of their own making, there was no testimony at all to support the Administrator's finding. He does not refer to any, and there is not any. The testimony of every mill owner showed that the source from which he drew his mill operatives was largely agricultural workers. It was further without contradiction that the wage rate established in agriculture probably did not average half what these workers were receiving. The evidence further showed without contradiction that other comparable industries of like character in the various communities where these petitioners had their mills, were lower by very large percentages than the scales maintaining in the mills.

A brief consideration of a few selected items of the testimony will illustrate that the Administrator acted without evidence to support his conclusion, and in disregard of proof which required an opposite result.

C. W. Mizell (R. 1388, 1393)

"Our mills employ entirely local help, for the reason that the mills were built entirely by local capital, for the purpose of giving employment to our local people who were idle and in need of employment, therefore, our hands are not skilled textile help and the work load of each employee is from 15 percent to 25 cent less than the same work load carried by the northern mill workers who are experienced in this line.

". . . The laborer in our section only receives from $1.00 to $1.50 per day whereas our minimum at present is $2.00 per day. . . ."

E. H. Morris, Jr., (R. 1402)

"Farm labor in the territory in which this mill operates is from 50 cents to 75 cents per day, and a day is considered from sun-up to sun-down.

"What is the average wage rate in your plant today?

"About 27½ cents an hour, and maybe 28 cents. . . ."

R. D. Sanders (R. 1568 to 1572)

"Starkville is the county seat of Oktibbeha County, located on the M. & O. Railroad, and is also an agricultural community. There is at Starkville the Borden Milk Plant, and a creamery, both of which pay 25 cents per hour, and they work 44 hours per week.

"The oil mill is completely closed down. The farmers are paying common laborers, such as hoe hands and plow hands, from 40 cents to 60 cents per

day. Mississippi State College itself pays only $1.00 per day for laborers working in the crops. Such laborers work from sun-up until sun-down. We are told that the WPA laborers in that county have been paid 20 cents per hour, and this is now cut off, and on account of a large proportion of crops in Oktibbeha County being drowned out, there is no outside work available.

Mr. Frank M. Kimble (R. 1630-1)

"Before our mill began operation Poulan was a town of about 200 people, today we have a fine little village of about 900 people and as happy a people as you will find anywhere on earth. Stately water oaks on each side of our streets and flowers and shrubbery around most of our homes. I have lived with these people most of my life and I am one of them; for almost 35 years I have had the management of this mill. I have given my life, my all to its welfare. I could have gone out somewhere else and done better than I have here but for the love of my people I preferred to stay here and labor with them. Ours is the only manufacturing industry in our county. The operation of our mill has furnished a market for many things grown by the farmer and to close it down will mean a loss to county, town and all the people in the community. My life savings are in property here and to close the mill would mean more than 50% loss to me. I am getting too old now to get out and look for new fields. Could soon apply for old age pension but trust I will never have to do this.

"We have some hands now making $15.00 per week while some others we have to donate some to bring them up to the 25 cents minimum and all on the same piece rate."

Paul A. Redmond (R. 1636, 1642-3)

"Employees at this lumber mill are paid wages of 25 to 35 cents per hour. Bottlers at the bottling plant are paid wages of 25 cents per hour and helpers are paid a wage of 17½ cents per hour.

"Employees at the ice plant are paid a wage of 12½ cents per hour. Skilled mechanics at the iron and welding plant are paid 40 cents per hour, helpers are paid 25 cents to 30 cents per hour and porters 10 cents per hour.

"Chilton County has a population of 24,579 and is an agricultural county. Clanton is the largest town in the County. The only other manufacturing plants located in Clanton are a lumber mill that employs from 7 to 10 employees, and an ice plant that employs 6 employees. Semi-skilled employees at such lumber mill are paid 25 cents per hour and skilled employees are paid on a graduated upward scale. Employees at the ice plant are paid from 10 to 25 cents per hour.

"Our mill is the only manufacturing plant located at Dadeville, except a lumber mill that employs 60 employees, and an ice plant that employs 5 employees. Semi-skilled employees at the lumber mill are paid 25 cents per hour and skilled employees are paid on a graduated upward scale. Employees of the ice plant are paid from 7¼ to 22½ cents per hour.

"Our Company operated its ten mills at a loss all during 1938 and up to the present time in 1939. We are now, of course, operating on the basis of 25 cents per hour minimum wage. While there are some slight variations in the average rate per hour paid at the different mills due to the different styles of cloth manufactured, the present average rate per hour for all mills is 30.9 cents.

"Approximately 72.65 per cent of our employees are now paid a rate of from 25 cents to 30 cents per hour and approximately 76.30 per cent of our employees are now paid a rate of from 25 cents per hour to 32½ cents per hour."

Mrs. Mary Pearce Hamilton (R. 1015-16)

". . . There is a road construction job not far away, and the unemployment office sent several of our able-bodied men employees over to work on that—they receive 20 cents per hour, out of which they must pay 50 cents per day transportation, which gives them a net earning of about 12 cents per hour. The work is much harder than their customary work in the mill. Also peach orchard—11 cents per hour.

Donald R. Comer (R. 965)

". . . . The present schedules of 25 cents and 44 hours changed some of our smaller mills from a lower wage and a longer hour schedule. I wouldn't say that these mills were just chiseling exploiters. I suspect that quite a few of them were still trying to meet the unfair competition of jute string and jute bagging, some of them trying to resist the rising tide of paper. An arbitrary law-made wage might do some quick crippling here, both to owner and employee."

Can the Administrator, in one brief sentence, dispose of all that testimony by the mere expedient of finding that it does not require a classification? If it does not, what is the reason for the provision in the Act? The evidence is undisputed, and as far as it is persuasive, only one conclusion can be drawn from it. The Administrator is not permitted to reach arbitrary and unfounded conclusions. His judgment must be based on the evidence, and if the evidence is all one way, his conclusion must be that way. The conclusion stated

by the Administrator as to these two undisputed factors is not supported by the evidence, and is arbitrary and unreasonable.

Conclusion As To Differentials.

As in the case of his finding as to the minimum wage, the Administrator's conclusion as to differentials is arbitrary and is not sustained by the evidence. His report is cast in carefu 'y selected words borrowed from the language of those employees of the Labor Department who have become expert in the use of the terminology found in controversies involving wages and kindred subjects.

As heretofore stated the repor' is based in major part on a series of incompetent and unconvincing bulletins developed largely by the subordinates of the Administrator. Corroboration by witnesses having personal knowledge of the facts is lacking almost entirely. When one weighs the evidence on which the Administrator based his finding against that introduced on behalf of the petitioner and intervenors, it will be found, with respect to practically every one of the propositions involved, that the Administrator had no substantial legal evidence on which to base his finding.

We submit, therefore, that an analysis of the facts alone tested in the lig! t of legal requirements as to admissibility of evidence, wholly fail to justify the order based on the Administrator's findings, and that it ought to be set aside.

C. The wage order is void because the general conclusions of the Administrator are contrary to law, and are not supported by substantial evidence.

At the conclusion of the Administrator's findings he states (R. 318):

> "Upon the basis of the evidence and my findings with respect to the effect of the minimum wage rate on employment in cotton textile manufacturing and in other sections of the textile industry as defined in Administrative Order No. 25, I hereby find that the minimum wage recommendation of Industry Committee No. 1 will not subtantially curtail aggregate employment in the textile industry or in any branch or section thereof, and will not cause substantial dislocation of employment in said industry or in any of its branches or sections."

The phraseology of this conclusion is worth noting. The Administrator does not say that the recommended wage would not substantially curtail employment, but states that it will not substantially curtail aggregate employment. Obviously he has used weasel words to avoid the effect of the overwhelming weight of the testimony that the loss of employment to the employees of the Southern Small Mill Group will be tremendous. If, by the use of the word "aggregate", he means employment over the entire United States, he is probably correct, since most of the employees displaced by his wage order would either dig out a meager subsistence from the infertile hills surrounding their communities or find employment on the W.P.A.

The further mention in his conclusion of "any branch or section thereof" is equally indefinite and inconclusive. To find what the Administrator means by the word "section" we need only to look at Record 318 under his heading, *Other Sections of the Industry.* From this paragraph it appears that the word "section" in the above quoted portion of the Administrator's findings refers to industries not properly grouped with textiles under Administrative Order No. 25; he having used these exact words antecedent to the word "section". Since none of the petitioners come within this section, the finding is irrelevant to the matter in hand.

The word "branch" is even more indefinite, since the Administrator furnishes no adequate clue as to what is intended. The nearest approximation to the purpose and intention of the Administrator in using this word is the heading appearing at Record 313, *Effects of the Recommendation on Employment in other Divisions of the Textile Industry.* Under this heading the Administrator includes rayon and silk window curtains, dyeing and finishing of cotton textiles, rayon and silk, jute and jute baggings for covering raw cotton, etc. In any event the Administrator could not have intended to say that there would not be substantial dislocation of employment in the Southern Small Mill Group as a unit or classification, whether that unitization or classification be on an economic, industrial or geographical basis. We have already demonstrated that he has repudiated any such classification, and that his action in doing so was contrary to the evidence, without support of substantial evidence, and contrary to the mandate of the statute in that behalf.

Uniformity of Minimum Wage Rates Recommended for the Textile Industry.

As an introduction to the conclusions of the Administrator under this heading, it is again pointed out that Dr. Murchison, the Cotton Textile Institute, and the American Association of Cotton Manufacturers did not want classification. From a reading of the Administrator's findings on this point (R. 320-1) one is almost lead to believe that classifications are a dreaded social evil, and that Congress had turned traitor to the modern age by making any provision therefor. The position of Dr. Murchison, the Cotton Textile Institute, the American Association of Cotton Manufacturers, and Mr. Robert R. West, have all been treated above (supra 15, 22, and 85).

Under the heading, *Cost of Living,* the Administrator refers to the study of the Bureau of Home Economics and the testimony of the witness Adamson, and disposes of both with this sentence:

> "Although regional variations in types of consumers goods may be taken into account it would not appear permissible for the purposes of this Act to place one region on a standard which determines adequacy of diet merely by the chemical ingredients of the food."

The Administrator does not say that the Bureau of Home Economics determines adequacy of diet merely by the chemical ingredients of the food as indeed he cannot for the reason that their survey, in addition to the chemical ingredients, considered vitamin contents and other relevant factors, to which the Administrator seems to have remained blind throughout the hearing.

The outstanding distinction between the survey made by the Bureau of Labor Statistics study, relied upon by the Administrator; and the Bureau of Home Economics study, relied upon by Adamson, is that in the former a standard diet was set up, and the cost of this diet was obtained by ascertaining the prices of standard brands of food falling within the various classifications in the regions under survey; whereas, the Bureau of Home Economics survey set up standards of food value by calories and vitamins and went into the homes to ascertain the number of vitamins and calories actually consumed, and their cost to the consumer. Adamson's testimony was based upon what the Southern worker actually consumed, whereas, the Administrator's findings are based upon an hypothesis which Adamson's survey demonstrates did not exist, and has never existed in any of the regions being studied.

This brings us to the analysis which the Administrator undertook to make of the testimony which he had at hand. He says (R. 324)

> "The test for determining the cost of living in different geographical areas to which the recommendation will apply is the monetary sum required to purchase an equal standard of living including equally desirable food from the standpoint of the consumer."

Leaving out the phrase "including equally desirable food", the Administrator finds no point at all on which to attack the testimony of Adamson. Since he does not attack the testimony of other witnesses showing the actual cost of the same items of food included in the Bureau of Labor Statistics survey to be about one-half of that shown by the survey in the communities where these mills are located, Adamson's testimony is the only evidence in the record which tends to support the findings of the Administrator at all. But since there is not a mere scintilla of evidence as to what food is equally desirable to the Southern workman and to the Northern workman, there is no basis upon which the Administrator might reject the testimony of Adamson. Thus, in rejecting the testimony showing the actual cost of food in the communities where these mills are located, and in rejecting the testimony of Adamson, the Administrator's findings are directly in confliet with all of the testimony available on this point.

Transportation Costs.

As to transportation costs, treated by the Administrator in his general conclusions (R. 326 et seq.), the court below reviewed the same evidence that the Administrator had before him and the entire proceedings before the Committee, and stated: (R. 362)

> "We are constrained to believe, however, that a preponderance of the evidence discloses that there is a decided rate disadvantage as against the Southern and Southwestern mills."

It should be noted that the discussion on this matter by the court below concluded with the citation of the case of *National Labor Relations Board v. Waterman Steamship Company,* referred to above. It has already been pointed out to this court that the court below felt constrained to hold anything that the Administrator relied upon to be substantial evidence due to the reference by this court to the case of *National Labor Relations Board v. Bell Oil & Gas Company,* 98 F. 2d, 406, in explaining its grant of the *certiorari* in the *Waterman case.* Thus, looking back of what was actually said in the court below and considering the circumstances under which it was said, we have an express rejection by the Fifth Circuit of the findings of the Administrator on the matter of transportation. As has already been pointed out, the conclusions of the court below could not have been otherwise since the evidence, common knowledge, and everyday experience demonstrate to any person whose mind is open that the small Southern cotton textile mills are compelled to operate under the handicap of a freight rate differential.

The Administrator considers the *Effect of the Minimum Wage on Employment in Small Southern Mills* (R. 309), and seems to concede most of what was contended for by the Small Mill Group. However, (R. 312) he states that the reports of the Federal Trade Commission, which distinguish between small and large mills on the basis of investment, show that small mills may make a high rate of return. The obvious answer to this is that the reports of the Federal Trade Commission is not on a study made upon the relevant factors required by the Fair Labor Standards Act to be considered by the Committee and by the Administrator. Neither is it

shown that any of the mills referred to in that report are required to operate under the handicap of a freight differential.

The administrator attempts to discount the testimony of the Small Mill Group because it shows that the rise in wages had already forced two of the mills included in its statistics to close or discontinue operation (R. 312). We cannot suggest any process or probable reasoning by which the finding of the Administrator can be supported by this fact. He recognizes that modernization and increase in capacity would enable some of the mills to continue their operation with the same number of employees. However, he omits from his consideration contingencies upon which his former holdings were based, that market conditions must improve or that purchasing power must be stepped up. He then undertakes to project the same line of reasoning to the mills which had undertaken to plan the necessary changes in their operation on the basis of the same output of finished products.

He points out that modernization in certain mills would result in the displacement of employees as follows: 75 out of 600; 106 out of 552; 25 out of 200; 20 out of 315; 125 out of 1353. This recitation is followed by his statement that the evidence offered to show that existing Governmental and private credit agencies are not in position to finance sound modernization programs in textile mills is not convincing. This statement has been referred to and discussed above (supra 97). Thus, the Administrator demonstrates that it is his intention by this order to displace the number or percentage of employees in the Small Mill Group as indicated by the figures set out above, and that he hopes this court will not find this dislocation of employment to be substantial. But even this unfortunate visitation which the Administrator consciously and deliberately thrusts upon the

Small Mill Group is based upon the conjecture, speculation, and hope that "the mills can continue to operate if wage conditions improve" (R. 313).

The conclusion of the Administrator on *Production Costs* (R. 337) that the mills of the South are of more recent construction and contain more modern machinery than mills in the North, overlooked entirely the distinction between the large mills and the small mills. As we have already pointed out, the chief beneficiaries of this wage order are the large textile mills located in the north and near the Atlantic Seaboard in the Southern states. This is the obvious basis for classification which the Small Mill Group began insisting upon as soon as it found itself being misrepresented by the Cotton Textile Institute and the American Association of Cotton Manufacturers.

Thus we have, in the general conclusions of the Administrator, a peculiar recognition of the factual basis upon which the Small Mill Group is entitled to claim differentials and resist the minimum recommended by the Committee; and a deliberate distortion of the conclusions to make it appear that they are applicable, not to these petitioners but to the more favorably situated and economically advantaged group intended to be the beneficiaries of the elimination of their competition.

POINT III

THE FAIR LABOR STANDARDS ACT IS UNCONSTITUTIONAL AS INTERPRETED BY THE ADMINISTRATOR AND SOUGHT TO BE APPLIED TO PETITIONERS.

Petitioner and Intervenors next contend that the Act, as interpreted and applied by the Administrator as above set out, is violative of the Constitution of the United States in the respects herein set out and is therefore unenforceable and that the wage order made pursuant to its terms is void.

We have had the privilege of examining a proof of the brief filed by appellee in *United States v. Darby,* Number 82 on the docket of this term of this court. We adopt and endorse all of the contentions made in that brief, and, in so far as they apply to this case, commend them for consideration by this court on this review. However, since the question raised on this review is the validity of the wage order, whereas the *Darby* case seems to turn on the validity of the Act, we present the following contentions in the hope that they will be considered against the background of what was said by the appellee in that case.

A. The Fair Labor Standards Act is an Invasion of the Powers Reserved to the States under the Tenth Amendment.

The Fair Labor Standards Act was drawn and enacted for the sole purpose of regulating wages and hours in industry and the ages of employees to be engaged therein. This is made manifest by the preamble, definitions, administrative organizations to administer the act, as well as each and all of its operative provisions. While the grant of authority to the central government to deal with any specific subject is plenary insofar as the power necessary to deal with that subject is concerned, it is not intended to destroy local power always existing in, and carefully preserved to, the States under the Tenth Amendment to the Constitution.[7]

A statute must be judged by its natural and reasonable effect.[8] However, even if this were not the rule, no other effect and no other reasonable characterization of this legislation is possible.

The cases holding that Congress may not, under the guise of the exercise of some one of the enumerated powers granted

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[7]*Fuller v. United States,* 213 U. S. 138; 29 S. Ct. 470; 63 L. Ed. 737. *Dartmouth College v. Woodward,* 4 Wheat. 518, 629. *United States v. Ohio Oil Co.,* 234 U. S. 548, 560; 34 S. Ct. 956; 58 L. Ed. 1459.

[8]*Collins v. New Hampshire,* 171 U. S. 30; 43 L. Ed. 60.

to it, regulate the purely local and internal affairs of a State are too numerous to mention. Among such familiar landmarks are

Hammer v. Dagenhart, 247 U. S. 251; 38 S. Ct. 529; 62 L. Ed. 1104;

Bailey v. Drexel Co., 259 U. S. 20; 42 S. Ct. 449; 56 L. Ed. 817;

Schechter Poultry Co. v. U. S. 295 U. S. 495; 55 S. Ct. 837; 79 L. Ed. 1570;

Panama Refining Co. v. Ryan, 293 U. S. 388; 55 S. Ct. 241; 79 L. Ed. 446;

United States v. Butler, 297 U. S. 1; 56 S. Ct. 312; 80 L. Ed. 477;

Rickert Mills v. Fontenot, 297 U. S. 110; 56 S. Ct. 374; 80 L. Ed. 538,

and cases cited therein. It will be noted in the course of this argument that the foregoing cases have not been overruled and that this Court has been at pains not to disaffirm or to weaken, in any way the force of its holdings in them.

In *United States v. Butler,* supra, the Court was dealing with a tax purporting to have been levied under the taxing power of the United States. It is noted that in conferring power upon the Congress to levy taxes, this authority was given the widest latitude of any of the enumerated powers in the Constitution by the addition of the phrase "general welfare". Surely, if any regulatory provision could be enacted by Congress to cover some subject of regulation not specifically enumerated, it could be done under this one. But the opinion states (297 U. S. 66)—

"As Story says: 'The Constitution was, from its very origin, contemplated to be the frame of a national government of special and enumerated powers, and not of general and unlimited powers'. Again he says: 'A power to levy taxes for the common defense and general welfare of the United States is not in common sense a general power. It is limited to those object. It can not constitutionally transcend them.' "[9]

In *Heisler v. Thomas Co.*, 260 U. S. 245; 43 Supt. Ct. 83; 67 L. Ed. 237, the Court stated that to extend the grant of power under the commerce clause to the subject of wages and hours in production or industry "would nationalize all industry, it would nationalize and withdraw from State jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production."

Any discussion of the separation of the powers of the State and Federal government should include with emphasis the following quotation from *Carter v. Carter Coal Co.*, 298 U. S. 295:

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[9] *Coe v. Erroll*, 116 U. S. 517; 6 S. Ct. 475; 29 L. Ed. 715; *Kidd v. Pearson*, 128 U. S. 26; 9 S. Ct. 6; 32 L. Ed. 352; *Oliver Iron Co. v. Lord*, 262 U. S. 172; 43 S. Ct. 526; 67 L. Ed. 929; *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210; 52 S. Ct. 559; 76 L. Ed. 1062; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165; 52 S. Ct. 548; 76 L. Ed. 1038; *Chassanoil v. Greenwood*, 291 U. S. 584; 54 S. Ct. 501; 78 L. Ed. 1004; *Federal Co. v. McLean*, 291 U. S. 17; 54 S. Ct. 267; 78 L. Ed. 622.

> "As this court said in *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227, 237—'the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'. Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the state is that the end of the journey may find the States so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain."

We are told that in the matter of Wage and Hour Regulations the division of powers between the state and the Federal Government and the restraints placed upon each of these agencies create a "no man's land" of governmental activity because of which our industry, commerce, and economy has been stifled and social progress has been prevented. This seductive cliche should seem absurd to anyone having an elementary acquaintance with the Constitution itself. If "the touchstone of the constitutionality of legislation is the constitution itself", it must be remembered that the bill of rights creates the greatest, broadest and most impregnable "no man's land" in our entire political system. It was the ideal and purpose of the framers of the Constitution to create these oases of liberty in which every individual could seek refuge and repose.

Whatever the needs of the social order may be, and however seductive the proposed solution of our economic and social ills may appear, if constitutional government is to

continue, the safeguards of limitations on power must be preserved. They must not be eroded away by epigrams nor undermined by the claque of a novel ideology.

These constitutional safeguards are not, and have never been, a no man's land on our political chart. As stated in the Tenth Amendment, they are reserved to the people, and therefore become every man's land. The Constitution itself provides the means and method for its amendment. If the people are to be required to surrender these strongholds of their liberties, it cannot decently be contended that they should be required to do so by intrigue, subversion, or "boring from within". If a constitutional guaranty or limitation presents an obstacle to the welfare and development of our country, democratic institutions require that the nature of the obstacle be made known to the people, and that they be given an opportunity to join in the campaign to storm, or blast it from the scene.

B. The act is Unconstitutional—not a Valid Exercise of the Power Conferred by the Commerce Clause.

The Act, as above shown, sets minimum wages and maximum hours for employees engaged in the manufacture of goods intended to move in interstate commerce, and prohibits the employment of child labor in the production thereof. Ancilliary to such regulation, it prohibits the transportation of goods manufactured in violation of its regulatory provisions and grants injunctive powers to aid in enforcement. The *prima facie* provisions contained in the penal sections render impractical the manufacture of goods for intrastate movement and local consumption by a manufacturer engaged, to any extent, in the manufacture of goods for interstate movements, unless the required conditions are met for both classifications. The regulation is extended to cover, not only the employees actually engaged in the production of goods

for commerce, but to any occupation necessary thereto, and to the production of any parts or ingredients of such products, even where the interstate movement does not begin until after the combination or fabrication of the finished product.

Had such a statute been enacted, a decade ago, any contention that it was constitutional would have been inaudible in the clamor for its unconstitutionality. With negligible lack of unity, the bar of the Nation would have pointed out that the scope of the Commerce Clause was the power to prescribe the rules by which movement across State lines was to be goverened,[10] that commerce "consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities," the manufacture of goods and the severance of raw materials being no part of commerce, even though they be intended to move therein,[11] and that, when commerce begins, is determined, not by the character of the commodity or the intention of the owner, but by its segregation and delivery to the carrier for transportation to another State.[12] Certainly, all manufacture for interstate commerce was not subjected to Congressional regulation by the framers of the Constitution.[13]

It would not have been contended that Congress, in the exercise of its power to regulate, could not prohibit transportation in interstate commerce. The power to prohibit has been upheld in a long line of decisions.

McDermott v. Wisconsin, 228 U. S. 115; 33 S. Ct. 431; 57 L. Ed. 754;

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[10] *Gibbons v. Ogden,* 9 Wheat. 1; 6 L. Ed. 23.

[11] *Deleware L. and W. R. Co. v. Yarkonis,* 238 U. S. 439; S. Ct. 902; 59 L. Ed. 1397.

[12] *Coe v. Errol,* 116 U. S. 517; 6 S. Ct. 475; 29 L. Ed. 715; *Bacon v. Illinois,* 227 U. S. 504; 33 S. Ct. 299; 57 L. Ed. 615.

[13] *Kidd v. Pearson,* 128 U. S. 1; 9 S. Ct. 6; 32 L. Ed. 346.

Hoke v. U. S., 227 U. S. 308; 33 S. Ct. 281; 57 L. Ed. 523;

In re Second Employer's Liability Cases 223 U. S. 1; 32 S. Ct. 169; 56 L. Ed. 327;

Lottery Cases, 188 U. S. 356; 23 S. Ct. 321; 47 L. Ed. 492;

Crutcher v. Kentucky, 141 U. S. 57; 11 S. Ct. 851; 35 L. Ed. 649;

Weber v. Freed, 239 U. S. 325; 36 S. Ct. 131; 60 L. Ed. 308;

Kentucky Whip and Collar Co. v. Illinois Cent. R. Co., 299 U. S. 334; 57 S. Ct. 277; 81 L. Ed. 270.

Thus if the present act, consistent with due process of law, amounted to no more than a prohibition of the transportation of certain commodities, or a limiting of the amount thereof which might be transported, it is probable that no dissension would arise as to its validity. If the prohibition be less than the total of a given commodity,—not violative of due process and primarily in the exercise of the power over commerce—administrative procedure may be provided for determining the portion thereof not subject to the prohibition, provided, of course, the limits of administrative action are defined with sufficient exactitude. This is the principle which was recognized in the recent case of *Mulford v. Smith*, 307 U. S. 38; 59 S. Ct. 648; 83 L. Ed. 1092. Under the statute in that case, shipment of certain tobacco in interstate commerce was prohibited. The extent of the prohibition was made to depend on certain factors ascertainable by the Secretary of Agriculture in appropriate proceedings.

However, such cases have no application here. The regulatory provisions do not designate any product which is to be denied free passage in interstate commerce. No administrative inquiry is made into what products shall pass and

what may be sold and consumed only in the locality of production. The sole administrative inquiry here is as to what wages are to be paid in industry. If these wages are paid, the instrumentalities of commerce may be congested with the products of industry, and no provision of this act will be violated. If the stream of commerce dries away entirely, there is nothing to encourage or promote its revival. Divorced from the mandate to pay certain wages for certain hours worked, the prohibitory provisions are meaningless, if not absurd.

The first finding in the declaration of policy section of the Act [Sec. 2(a)] is that the condition named, "causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States." The evident purpose of this finding is to invoke the doctrine of the cases upholding prohibitory legislation referred to above.

It has already been shown that these cases are inapposite. The present Act does not prohibit the spread of the evil aimed to be cured. It does not prohibit the spread of anything, nor the movement of anything in commerce, except in aid of the mandatory provisions of the Act with respect to wages and child labor. If it be urged that in *Mulford v. Smith* (supra) 307 U. S. 38, 48, the Court said that—"The motive of Congress in exerting the power is irrelevant to the validity of the legislation", let it be remembered that the statement follows that portion of the opinion in which the Court had been at great pains to show that the statute was a regulaion of commerce as to which it had the power to prohibit; and that the incidental results, which were undoubtedly the motivating influence in producing the legislation, were no part of its specific regulation or prohibition.

The same argument might equally well be advanced under the case of *United States v. Rock Royal Co-operative,* 307 U. S. 533; 59 S. Ct. 993; 83 L. Ed. 1446. But in the latter case, the distinction is made acute when it is pointed out (307 U. S. 570) that the price regulation is restricted to milk moving in interstate commerce, and that a State may regulate the prices for milk sold or consumed within its borders, even though its producers were subject to the Act as to interstate sales. See also *Milk Control Board v. Eisenberg Farm Products,* 306 U. S. 346; 59 S. Ct. 528; 83 L. Ed. 752.

The second finding, that the condition "burdens commerce and the free flow of goods in commerce," obviously invokes the "stream of commerce" theory of regulation. The cases upholding these regulations all recognized that the property subject to regulation was actually in or commingled with that in interstate commerce, and that the movement or transaction had not been completed. *Stafford v. Wallace,* 258 U. S. 495, 42 S. Ct. 397; 66 L. Ed. 735; *Board of Trade v. Olsen,* 262 U. S. 1; 43 S. Ct. 470; 67 L. Ed. 839; *Texas and P. Ry. v. United States* (Shreveport case), 234 U. S. 342; 34 S. Ct. 833; 58 L. Ed. 1341. As against the "stream of commerce" theory, its limits are set by *Carter v. Carter Coal Co.,* 298 U. S. 238; 56 S. Ct. 855; 80 L. Ed. 1160; and *Schechter Poultry Corp. v. United States,* 295 U. S. 495; 55 S. Ct. 837; 79 L. Ed. 1570, neither of which cases has been overruled or disapproved by this Court.

Stafford v. Wallace, supra, involved sales made at stock yards, the sale being the factor of prime importance in the interstate transaction. *Board of Trade v. Olsen* involved transactions in grain futures which Congress had found to be a recurring burden on interstate commerce. In both these cases, the subject matter of the regulation is the sale pro-

ducing interstate movement. The commerce protected was within the limits set by the *Carter* and *Schechter* cases. In the *Shreveport Rate Case,* the intra-state movement was subjected to regulation only to the extent and for the reason that it burdened interstate traffic, as that traffic has always been defined. The cases mentioned here are thought to be extreme, and the distinction between the regulation here involved, and that under consideration in other cases involving the "Stream of Commerce" theory will be even more apparent. At most, that line of decisions is applicable here only insofar as they may be illustrative of the extent and nature of the subject matter and the actual movement thereof necessary to regulation.

The third and fifth findings that the named condition "constitutes an unfair method of competition" and "interferes with the orderly and fair marketing of goods in commerce" are patently referable to cases upholding the several fair trade enactments. The argument on this theory would be that Congress can protect producers against unfair methods of production if it can protect against unfair methods of selling. Aside from the fact that in no case has the doctrine ever been applied to production, price differentiation has always been considered a fair and normal method of competition, even though it be subject to a degree of control. The theory of the Federal Trade Commission cases does not reach prices, it being conceded that the owner of property may sell or refuse to sell at any price, according to his own predilections, but provides regulatory machinery designed to prevent the diversion of commerce from channels of fair trade practices by false advertising, price discriminations, etc., to the advantage of the unfair trader. *Old Dearborn Distributing Co. v. Seagram Distilling Corp.,* 299 U. S. 183, 192; 57 S. Ct. 139; 81 L. Ed. 118.

In *Schechter Poultry Corp. v. United States, supra,* 295 U. S. 495, 458, the Court said:

> "Thus, the government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that labor represents 50 to 60 per cent of these costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work translates his saving into lower prices; that this results in demands for a cheaper grade of goods, and that the cutting of prices brings about a demoralization of the price structure. Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the Federal Government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce., it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into costs could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of Federal control, the extent of the regulation of cost would be a question of discretion and not of power."

Thus, the strongest argument for the validity of the legislation is to be found in the National Labor Relations Board cases, upholding legislation enacted to prevent obstruction to commerce. In *National Labor Relations Board v. Jones & Laughlin S. Corp.,* 301 U. S. 1; 57 S. Ct. 615; 81 L. Ed. 893, it was said, 301 U. S. 37.

> "That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within Federal control is demonstrated in the

> case of carriers who are engaged in both interstate and intrastate transportation. There Federal Control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of interstate services. . . It is manifest that intrastate rates deal *primarily* with a local activity. But in rate-making they bear such a close relation to interstate rates that effective control of one must embrace some control over the other. . . . It is said that this exercise of Federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The protective power extends to the former because it exists as to the latter."

There, we have no departure from the accepted concept of what constitutes commerce. There is no departure from the principles upon which it is to be regulated by Federal law. It is the same movement of men and merchandise from one State to another. An honest construction of the Fair Labor Standards Act reveals no disposition to eliminate from the channels or stream of commerce such movements as would burden the instrumentalities or hinder the flow. Indeed, such considerations receive no more attention than if no transportation were to be involved, except that the channels of commerce are to be closed unless the regulatory provisions as to wages, hours, and age of employees are not complied with.

In the recent case of *Sunshine Anthracite Coal Company v. Adkins,* No. 804, 310 U. S. 381; 84 L. Ed. ....., this court upheld a tax imposed as a sanction in aid of the enforcement of legislation already found to be within the constitutional power of Congress. In that case this court said:

"Clearly this tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the Act. But that does not mean that the statute is invalid and the tax unenforceable. Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it. Head Money Cases (*Edye v. Robertson*) 112 U. S. 580, 596, 28 L. Ed. 798, 803, 5 S. Ct. 247. And see *Sonzinsky v. United States*, 300 U. S. 506, 81 L. Ed. 772, 57 S. Ct. 554. It is so utilized here."

The question presented here is whether or not the courts may exercise a power which it may have under the commerce clause as a sanction to enforce a regulatory power which it clearly does not have. It cannot be contended that all production is commerce within the regulatory power of Congress, since clearly not all production is for movement in interstate commerce. But if the production of goods not to move in interstate commerce is not commerce within the meaning of the Constitution, then the production of goods intended to move in commerce would not be commerce where the same physical and chemical elements were involved and the same acts performed. Unless some distinction, other than the state of mind of the person responsible for the production, as to a future event which may or may not take place, can be made the distinction between the two transactions, then no distinction exists in fact. But this is exactly the case before the court. Under the Fair Labor Standards Act Congress has sought to use its admitted power under the commerce clause to provide sanctions for the enforcement of its regulation of wages and hours in industries it has

no power to regulate. It has gone even further—not having the power to regulate wages and hours in industry, it has set up prohibitions against the movement of goods in interstate commerce as a sanction to enforce its unpermitted regulations. But assuming that it had the power to regulate because it had the power to impose sanction, it has set up machinery for establishing standards by which the sanction shall be imposed. It has established an administrative procedure for the determination of issues which shall be the basis of future action between the petitioners and the Government, the petitioners and the public, the petitioners and their customers, the petitioners and their competitors, and the petitioners and the carriers engaged in the movement of their products in commerce.

In the literature which has been widely circulated since the enactment of this Act, it has been suggested that, since it clearly comes within the holding of the Court in *Hammer v. Dagenhart*, 247 U. S. 251; 38 S. Ct. 529; 62 L. Ed. 1101, the Court will be required to determine whether or not that case is to stand. In the hearing before the two legislative committees on the bill then pending, the then Solicitor General testified, in part:

> "That is the section—[section 7 (a) of the bill then pending] that is based on the dissenting opinion in *Hammer v. Dagenhart*, and which we believe the Court will sustain".[14]

Thus, the Act came into being with the recognition that it was contrary to the former holdings of this Court, and that the only hope for its validity lay in the possibility that

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[14]Joint Hearings before the Committee on Education and Labor, United States Senate and the Committee on Labor, House of Representatives, Part 1, page 50.

the Court would overrule its former decision. This hope has been inflated by the views expressed by the Court in the Labor Relations Board cases and in the various Agricultural Act cases. But in none of these cases has the Court overruled any former decision. In none has it expressly departed from any previously recognized principle or ingrafted any new doctrine upon the body of constitutional law. The holdings have repeatedly and expressly pointed out that the power recognized was the power to regulate commerce; and they have been explicitly limited to the state of facts then before the Court.

The reasoning of the then Solicitor General, referred to above, that the Act was supported by the dissenting opinion of Mr. Justice Holmes, proceeds upon a consideration of the section standing alone. So to take the provision out of its setting and disregard its relationship to the other provisions of the Act, violates rules of construction as old as the Constitution itself, and which can not be questioned. Let us look to the language of Mr. Justice Holmes:

> "The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects, and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given the power to regulate such commerce in unqualified terms."[15]

Thus, the dissent is based, not on the proposition that because Congress can regulate what shall be transported in commerce, it can regulate the conditions under which the subjects to be transported can be produced; but, on the contrary, it is addressed to what was considered an unwarranted

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[15]247 U. S. 277.

assumption that Congress was trying to do, to a limited degree, what it expressly, openly and intentionally does in the present Act. Mr. Justice Holmes did not say that Congress could regulate the ages of employees who might be permitted to work in industry. He merely said that on a finding of policy by Congress that the movement of goods produced by child labor was bad, Congress could prohibit such movement in interstate commerce. By implication, the holding recognizes and bulwarks the holding of the majority that Congress can not regulate the industry, but quarrels therewith only insofar as it holds that a bare prohibition of such movement should be construed as regulation of industry and not commerce.

If the draftsmen of the present Act had been commissioned to draw legislation that would obliterate this distinction and put Mr. Justice Holmes on the side of the majority, they could not have done better. To uphold the present Act on the basis of the dissent in *Hammer v. Dagenhart,* it is necessary to read out all the provisions which regulate or provide for the regulation of wages, hours or the age of employees in industry. But when this is done, as pointed out above, the prohibitions, which Mr. Justice Holmes refused to consider as being or intended to be regulations in the Child Labor Act, are meaningless, abortive and perverse.

The sole remaining theory upon which constitutionality of the Act could be urged under the authorities, it that recognized by the Court in *Santa Cruz Fruit Packing Co. v. National Labor Relations Board,* 303 U. S. 453; 58 S. Ct. 656; 82 L. Ed. 954. In that case, the rule is laid down that, "The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these

practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes." Here, no question of whether the practice is good or bad is presented. The practices may be ever so unfair and in violation of the Labor Relations Act, insofar as it or the Labor Board determine what is unfair, but without that "close and substantial relation to the freedom of interstate commerce from injurious restraint" that brings them within the federal cognizance, they are without the scope of the Commerce Clause. This "close and substantial relation," says the Court, must be faced upon the facts. But the present Act takes no notice of the facts, other than the declaration of Congress of the existence of an evil and the desirability of extending the commerce power to the regulation of wages and hours in industry. Unlike the National Labor Relations Act, no cognizance is taken of the facts with reference to any particular employee.

However, the salient facts, matters of common knowledge and considerations which evidently were before Congress when the Act was passed, demonstrate the perversity of resort to the power to regulate commerce, for the purpose of this act. The holding of the Court in the *Jones and Laughlin case* (supra) (301 U. S. at 37) that activities which, considered alone, would be intrastate, may be regulated if they bear the "close and substantial relationship" to interstate commerce where their control is essential or appropriate to the protection of that Commerce from burdens or obstructions, undoubtedly set the pattern for the draftsmen of the Act, the *Santa Cruz case* not having been decided when the Act was drawn. The "freedom" referred to in the *Santa Cruz case* must be from "injurious restraint" and "burdens and obstructions."

No administrative inquiry is directed at what hinders commerce. No question as to what is a misuse or abuse of that commerce is subjected to administrative determination. The inquiry is to be "the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in said classification and (2) will not give a competitive advantage to any group in the industry". The inquiry is not as to what burdens or obstructs commerce, but is directed to competitive conditions as effected by transportation, living and production costs, and the wages already established and maintained in the industry.

To argue that low wages, long hours, or the tender age of workers are restraints on commerce is so obviously fallacious as to require no discussion. That they could constitute "injurious restraint" would be to add absurdity to fallacy. Likewise, it seems incredible that any contention could be made that wages and hours could contribute burdens and obstructions to commerce, except as they applied in the transportation industry. However, the principle was extended in the Labor Relations Board cases (supra) 301 U. S. 1, to include labor practices in industry which might or were calculated to lead to strikes,—stopping the supply of goods at its source. Can it be said that the amount of wages paid in a small-town Alabama cotton mill has a tendency to stop the supply of goods at its source? Obviously, it does not, if it be assumed that workers continue to work.

But if it be assumed that the workers may refuse to work, thereby cutting off the supply, the wages also cease, and there is no appropriate means provided to revive the flow. The prohibition is rendered inoperative and the evils sought to be remedied are aggravated. Specifically, a wage of 30 or 32½ cents per hour in a Mill like any of these involved in this case, because of its confiscatory operation,

deprives the workers, not only of what Congress has decreed to be a substandard wage, but of any wage at all. A Mill which was once one of the springs which supplied the stream of commerce is closed, or its operations curtailed, so that what was once a free flow is stopped or reduced to a trickle. No burden is removed from commerce, but commerce is additionally burdened by the necessity of carrying raw materials from the area of its origin to an area of manufacture, thence back to the area of its origin, for consumption.

The wages paid in agriculture being from one-third to one-half what were paid in these industries (the Mills now invoking the jurisdiction of this Court) the employees have no alternative but to return to the fast growing groups of tenant farmers and wage hands, who make up the most poverty-stricken group in our society. But the effect does not stop here. The hope of the tenant farmer and farm hand has been in the field of diversification, with the industrial worker providing a market for his diversified crops. Thus the displacement of the low wage earners in the mills of these petitioners aggravates the conditions, the correction of which is the expressed purpose of the Act, by depriving those workers of their wages, destroying the market of the underprivileged farm group, and adding to the number of the latter, the workers displaced from industry.

If, in invoking the Labor Board cases, it is argued that wages are a cause of labor unrest and may be the subject of a strike, let it be remembered that no such finding appears in the act or in the record in this case. Wages may be the subject of a labor dispute. So may anything else. The range of possible disagreements in such cases is as wide and varied as the scope of industry and the differences in individual desires and inclinations. Conceding that Congress can set

up machinery for determining what are unfair labor practices and for penalties for engaging therein, it does not follow that Congress can reach into the infinite number of causes of labor disputes, seize upon the one privilege of citizens most personal to them,—the right to decide for themselves what they will ask or pay as wages,—and dictate that term into any employment contract that may be made. No court has ever held that it could be done.

If the Labor Board cases had been followed in this act, it would have required the filing of a complaint against the low wage employer charging him with paying such low wages that they threatened to bring on strikes, which in turn would burden or obstruct interstate commerce. A hearing would be held in which justicable issues would be joined on (1) whether the wages were low, (2) whether they tended to produce strikes, and (3) whether the strike would burden or obstruct commerce. On the latter issue, the finding required in support of Federal action would be that the obstruction or burden would be proximate, and not remote. No such finding has been made, either by Congress or the Administrator.

However, the evidence in this record demonstrates that the workers employed by these petitioners are in rural or semi-rural communities and either work part time in the Mills and part time on the farms, or have no alternative but to work in the Mill or on the farm; that their wages in the Mills are from two to three times greater than their possible earnings on the farm; that they are satisfied with their wages and working conditions, and prefer to continue under the present arrangement; and that there is nothing upon which to base a suspicion that they will undertake a strike at all.

The administrator took the view, during the hearings before him, that these were not the conditions he was to consider. His theory seems to have been that low wages in the South produce low priced goods which move in interstate commerce and depress the price of similar goods manufactured in the North, which in turn depressed wages in the North and, not due to differences in cost of living, but for some unnamed reason, northern workers would not accept the lower wages. (Compare *Schechter case*, supra). But is this burden or obstruction on interstate commerce within the "close and substantial relationship" that warrants Federal control under the Santa Cruz case; or is it not "remote and indirect," originating with wages in one region, reflected by prices in that region, which bear upon prices in another region which depress wages in the latter region, which may lead to strikes in the latter region, which may obstruct or burden commerce?

It is in this "House that Jack Built" that the Administrator has chosen to install his order; hence, even though the act might be susceptible to another interpretation, it would have no application here. The act itself and the interpretation by the Administrator on which the order appealed from was entered, are inextricably interwoven in the regulation of economic conditions denounced in the *Schechter* case.

Moreover, to apply the doctrine of the Labor Relations cases, the Court must find, contrary to the evidence undisputed on the record in this case, first; that wages in industry may burden and obstruct commerce, and will divert its flow, and, second, that the regulations provided for such wages are such as are appropriate to prevent such obstruction and diversion, or to increase and augment its flow. In so doing, the Court may not consider the Act as an infla-

tionary measure to increase buying power. (*Schechter case*, supra).

Unlike the Labor Board cases, where strikes in industries stop the flow of commerce, it must find that low wages tend to decrease or stop the flow, whereas, high wages tend to accelerate or increase the flow, and that the relation of the wages paid to the flow of commerce is so "direct", as contrasted with "indirect", and so "close and substantial" as contrasted with "remote and distant", that the paramount power of Congress to regulate commerce overrides the admitted power of local government to regulate an admittedly local activity. This in addition to the element of intent cited by Mr. Justice Cardoza on a comparison of *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310; 45 S. Ct. 570; 69 L. Ed. 963, 970 with *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 410; 42 S. Ct. 570; 66 L. Ed. 975, as made in the *Schechter case*, 295 U. S. 495, 547; 55 S. Ct. 837; 79 L. Ed. 1589. Moreover, the holding must be contrary to the implied effect of the holding in tax cases upholding local taxes on goods segregated for transportation in interstate commerce, *Cf. Bacon v. Illinois*, 227 U. S. 504, 516; 33 S. Ct. 299; 57 L. Ed. 615; *Stafford v. Wallace*, 25 U. S. 526; 43 S. Ct. 397; 66 L. Ed. 745; *Minnesota v. Blasius*, 290 U. S. 18; 54 S. Ct. 34; 78 L. Ed. 121, approved by the Court in the *Santa Cruz case, supra*, 303 U. S. 453, at 466.

We recognize that it is not within our province to examine and criticize legislative policy so long as that legislation is within the delegated powers of the central government. However, let it be supposed that the state of Alabama, which is capable of producing 90 per cent of the raw material it consumes, finding it impossible to stem the tide of legislative restraint upon its incursion into interstate commerce, de-

veloped a self-sufficient economy or one that was 90 per cent self-sufficient. Let it also be supposed that Mississippi, which produces about 70 per cent of the raw materials which it consumes, likewise developed an economy which was 70 per cent self-sufficient. Let it further be supposed that this readjustment took away from the manufacturing centers of the East, the food packing and furniture manufacturing centers of the mid-west, and the wheat, sugar and potato producing sections of the West, a sufficient proportion of their business, that increment which spells the difference between profit and loss, to make further activity in these regions unprofitable. Would it be contended that the central government had the power under the commerce clause to require these states to export a larger portion of their raw materials and to devote less activity to the production of finished products. If it could not, its only recourse would be to repeal the laws which had compelled these states to seek self-sufficiency. It is this free-flow of commerce, the movement of raw materials from the regions where they may be most efficiently produced to the regions where they may be most efficiently manufactured, and the movement of the manufactured products from the point of manufacture to the point of consumption, that is the special concern of the commerce clause. How can it be said that the commerce clause authorizes the central government to do exactly the opposite of that which its draftsmen intended should be accomplished.

C. Act is Unconstitutional because it Constitutes Unwarranted Delegation of Legislative Power to Administrator.

The Act in question delegates to the Industry Committees and to the Administrator, the power to make classfications within the industries and to determine the highest minimum wage for each classification within each industry, not under thirty nor over forty cents per hour. The purpose of the action of an industry committee is defined to be

that of carrying out the policy of the Act by reaching, as rapidly as possible, the declared purpose of the Act; i. e. the attaining, as rapidly as is economically possible without substantially curtailing employment, the objective of a universal minimum wage of forty cents an hour.

In recommending classifications and wage *minima*, the Committee is directed to consider competitive conditions as affected by transportation, living and production costs, and also wages established in the industry by collective bargaining agreements and by employers maintaining minimum wage standards. It is enjoined from recommending any minimum wage for any classification which will give a competitive advantage to any group in the industry. The same conditions, limitations and restrictions are imposed upon the Administrator, with the further limitation that he must find that the Committee's recommendation was made according to law, and is supported by substantial evidence adduced at a hearing before him.

A wider range of administrative discretion is permitted in the authorization of employment of learners, apprentices, messengers and handicapped workers under certificates to be issued by the Administrator. No explicit guide is offered to aid the Administrator in determining how low the wage may be in such cases, although he is directed to prescribe limitations as to time, number, proportion and length of service.

Still broader powers are conferred upon the Children's Bureau. It is authorized to determine what occupations are particularly hazardous for the employment of children between sixteen and eighteen years of age; what occupations are detrimental to their health or well being; and what occupations will interfere with the schooling, health or well being of children betwen fourteen and sixteen years

of age. Employment of children within one of the catagories so fixed by the Bureau is made a criminal offense.

Taking the most circumscribed field of delegated powers —that of making classifications and fixing minimum wages therefor—there are no tests, limitations, definitions or directions to guide or limit the Committee or the Administrator in their actions. It is not indicated what is meant by classifications,—whether mills, departments, activities, products, types of employees, types of machinery or classes of raw materials are to be used as the basis of classifications in industries. These tests are only a few of the many which might be mentioned.

Particular care was displayed in the matter of fixing the limits within which the Administrator or the Industry Committee could function, as to the amount of wages to be fixed as the minimum. In determining what minimum wage would be applicable, not less than the minimum preseribed by the Act and not in excess of 40 cents per hour, the Administrator and the Industry Committee are directed to ascertain the highest minimum wage rate which will not substantially curtail employment and will not give a competitive advantage to any group in the industries. Here, two well defined and definite conditions are prescribed for promulgating any order affecting wages. Had the Act proceeded no further, the limit and test provided for might conceivably have been sufficient. In that event, it could be argued with much more force that the standards would have come within those permitted by the decisions in *United States v. Rock Royal Cooperative,* 307 U. S. 533; 83 L. Ed. 1446, and in *Mulford v. Smith,* 307 U. S. 38; 59 S. Ct. 248; 83 L. Ed. 1092. But the Act goes further and requires that, in determining what classifications should be established in the industry, and in determining the minimum wage rate which will not substan-

tially curtail employment in such classifications, and will not give a competitive advantage to any group, the Committee and the Administrator shall consider, among other relevant factors: (1) competitive conditions as affected by transportation, living and production costs; (2) the wages established for work of like or comparable character by collective labor agreements; and (3) the wages paid by employers who voluntarily maintain minimum wage standards.

The injection of these requirements as factors in the equation by which the minimum wage is to be determined raises two questions; first, what relative importance or value is to be placed upon the factors thus imposed; and, second, the possible relationship thereof to the two affirmative findings required of the Committee.

Since there are three sub-factors included under the first factor, there are, in fact six factors, each of which must be related to the two issues which the Committee and the Administrator must find as a prerequisite to the entry of a minimum wage order. There are thus created sixty-four relationships, or combinations as to which no value is established and no rule for determining value is suggested by the Act. It readily appears that the wages paid by employers who voluntarily maintain minimum wage standards may have no relationship whatever to curtailment of employment, but might weigh heavily on the question of competitive advantage to any group in the industry. Does this mean that the Administrator and the Committee may ignore such wages in the consideration of what wage will not substantially curtail employment? The Act does not so state. Under its terms and provisions, the Administrator and the Committee would be equally at liberty to ignore this factor in the determination of whether or not a given minimum wage will give a competitive advantage to any group. Since this same uncertainty

persists throughout the entire list of relationships required by the Act, there are thus an equal number of indefinite relationships established in the Act, without any definite guide or test by which the administrative action is to be governed.

The lack of specification for these values has the effect of commissioning the Administrator and the Committee to proceed to roam at large within the field of legislative power to fix a minimum wage between 30 and 40 cents per hour, without regard to the real question of curtailment of employment and competitive advantages, since it is inconceivable that some one of these factors will not support any arbitrary or capricious finding which might be made, and there is no limit to the power to evaluate these factors.

It becomes evident that the draftsmen of the Act, being cognizant of the necessity of establishing limits and standards for administrative procedure, conceived the plan of meeting this requirement, but thereafter nullifying compliance by injecting so many indefinite and indeterminate factors into the proceeding that the Committee was left with an unfettered discretion, such as that denounced in *Schechter v. U. S.*, 295 U. S. 495; 55 S. Ct. 837; 79 L. Ed. 1570, and in *Panama Refining Co. v. Ryan,* 293 U. S. 388; 55 S. Ct. 241; 79 L. Ed. 446. That no direct denunciation of such treatment of delegation of legislative power is forthcoming is evidence only of the fact that no prior act has contained any comparable provisions. The basic question presented is whether or not the test of constitutionality is met by establishing limits and tests for the exercise of administrative power, and then destroying these limits and tests by further definitions and the imposition of conditions and limitations readily available by simply following the mathematical rules governing combinations. It is submitted that such treatment will not meet the test of constitutionality, since the Act must be construed

as a whole, and perfunctory compliance will not suffice where the substance of the Constitutional limitation has been flaunted.

Standards Not Sufficiently Defined.

Is not this "confusion worse confounded" when some of the terms of quite vital import are considered, by which the drafters of the Act sought to direct and limit the discretion committed to the Administrator? By way of illustration, we invite the Court to consider such phrases as "other relevant factors," "competitive advantage", "substantial" unemployment and the like. One has the instinctive impulse to ask, as this Court did in the *Schechter* case (295 U. S. at 531):

> "What is meant by 'fair competition' as the term is used in the Act?"

By what rule is the Administrator to determine what is meant by "other relevant factors"? Does that mean that the Administrator shall look to other factors like those enumerated, or of similar character? The Act does not say so. The discretion is left entirely to the Administrator to consider any factors which commend themselves to him as relevant. No category is defined, no limit is set, no characterization is furnished to indicate the kind of factors Congress thought should be weighed in making this important decision. Again, the Administrator was given an unfettered discretion.

Probably more vital are the other two vague terms suggested above, because they constitute the very essence of the two ultimate considerations which must animate the Committee—and, therefore, the Administrator—in deciding such fundamental questions as the minimum wage and classifications. In other words, after all of the "relevant factors"—those enumerated by Congress and those left to be defined by the Administrator—have been considered, the rule by which

decision shall be reached embraces a decision on these two decisive points, to wit: "substantial" unemployment and "competitive group advantage". In the interest of brevity, we discuss only the former of these two terms.

The Court will be mindful of the fact that rules and regulations emanating from executive discretion—

> "are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined—"

(*Panama Refg. Co. v. Ryan*, 293 U. S. at 429)

One of the fundamental limitations Congress evidently wanted to be sure would not be transcended was the throwing of workers out of jobs. There was the desire to raise the wages of the workers, but that was conditioned, always, on the greater desire that the reaching of this goal should not be at the expense of destroying the jobs which might pay the advanced wages.

The Administrator was cautioned, therefore, not to establish any wage which would "substantially curtail employment". As far as any wage order might or might not effect unemployment, it would have to do, not with a "subordinate rule", but with a rule of policy following the essence of the whole Congressional scheme. A definite and understandable rule must be laid down, therefore, by Congress so that the Administrator would be entirely certain what "substantial unemployment" was, so that he might be sure that the subordinate rules he promulgated might not transgress the standard thus definitely fixed.

This the Act wholly fails to do; on the other hand, it leaves to the Administrator to determine when, and under what circumstances, unemployment shall be considered "substantial". The definition which the Administrator makes

of that one term is bound to determine, in large measure, his whole decision in any given case; and it is one of the most vital factors which will affect this Court's determination of this case.

The definition which the Administrator evidently made of the term "substantial" in this case illustrates the vice of leaving so fundamental and vital a decision to one man. It is clear that the Administrator has decided that unemployment, to be substantial, must affect a considerable proportion of the workers in a whole industry. In other words, he seems to feel that if, looking over the whole field occupied by an industry, national in scope, only a relatively small percentage of workers will be thrown out of work, this unemployment will not be substantial.

Under that determination, the fact that all, or a substantial part of the industry in a given area, may be put out of business is not to be given serious consideration. If it so happens that these petitioners are employing the people who will thus be put into the number of unemployed, that is just one of the things which is bound to happen in the application of the act.

Could Congress have meant that? Just what did Congress have in mind when it inserted the term "substantial unemployment"? Did it mean unemployment in any particular group, or any particular area, or at any particular season? Did it mean that the term was to be thought of as it applied to the higher wage levels, or the lower wage levels; was any particular mill, or group of mills, or any particular section to have consideration in reaching the determination; or was the whole industry to be looked to in arriving at a decision as to whether the unemployment was or was not "substantial".

While, as stated, the draftsmen of the Act have doubtless been at great pains to square it, if they could, with the cases referred to, it will become quite evident that they have failed to do so, if the Court will consider how wide and uncharted a discretion is given the Administrator in matters so vital.

D. The Act is Unconstitutional because, as Interpreted and Applied by Administrator, it Deprives Petitioners of their Property Without Due Process of Law.

Section 2 of the act here under consideration sets out the findings upon which it proceeds in subsection a, and the declaration of the policy of Congress in subsection b. The primary or basic finding is the existence, in industries engaged in commerce, of labor conditions detrimental to the maintenance, health, efficiency and general well-being of workers. The policy, as expressed in subsection b is the exercise by Congress of its power to regulate commerce to correct and eliminate the conditions found to exist in subsection a. The enumerated results of the conditions found in subsection a, are no more than attempts to relate the legislation to approved theories of commerce regulation under the power delegated to Congress by the States. The declared purpose of the Act being to eliminate conditions detrimental to the health, efficiency and general well being, the act is characterized as a police regulation, no matter what grant of constitutional power its enactment may invoke.

Like the other enumerated powers conferred upon Congress by the Constitution, the power to regulate commerce is subject to the limitations that private property may not be taken for public use without just compensation, and that no person shall be deprived of his property without due process of law.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 336; 13 S. Ct. 622; 37 L. Ed. 463;

United States v. Chicago M. St. P. & P. R. Co., 282 U. S. 311, 327; 51 S. Ct. 159; 75 L. Ed. 359.

While the Constitution contains no description of those processes which it was intended to allow or forbid, yet it was not left to the legislative power to enact any process which it might devise. *Murray v. Hoboken Land Co.,* 18 Howard 272; 15 L. Ed. 372. In order that any statute be sustained as an exercise of the police power, the Court must be able to see that the enactment has for its object the prevention of some offense, or manifest evil, or the preservation of the public health, safety, morals or the general welfare. *Lawton v. Steel,* 152 U. S. 133; 14 S. Ct. 499; 38 L. Ed. 385. Moreover, it must appear that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the enactment tends toward the accomplishment of the object for which the police power is exercised. *Lawton v. Steel* (supra). No enactment in the guise of the exercise of the police power may effectively invade private or property rights for the exclusive benefit of particular individuals or classes.

The purpose of the guaranty of due process in the Fifth Amendment is to prevent governmental encroachment against the property of individuals, to secure the individual from the arbitrary exercise of the powers of government, and restrain, by the established principles of private rights, and to protect property from confiscation by legislative enactment, seizure, forfeiture, and destruction, without trial and conviction. *Chicago etc. R. R. Co. v. Chicago,* 166 U. S. 226; 17 S. Ct. 581; 41 L. Ed. 979. The guaranties of due process of law extend to every governmental proceeding which may interfere with personal or property rights, whether the pro-

ceeding be legislative, judicial, administrative or executive. *Home Telephone Co. v. Los Angeles,* 227 U. S. 278; 33 S. Ct. 312; 57 L. Ed. 510. The foregoing principles are so elementary that we do not anticipate that they will be seriously contested in this proceeding.

What the framers of this Act evidently attempted to do was to extend to Congress the power to legislate for the nation in a manner coextensive with the State legislation approved by this Court in *West Coast Hotel Co. v. Parish,* 300 U. S. 379; 57 S. Ct. 578; 81 L. Ed. 703. This Act has evidently been modeled, as well as might be, after the State statute there permitted to stand. That there are essential points of difference in the two situations, will appear from a consideration of the Parish case in the light of the prior decisions of that Court on the same and allied subjects. This Court has frequently cautioned that the language used in an opinion must be interpreted in the light of the facts then before it, and be limited to the conclusion reached in the light of those facts.

The Parish case, while overruling the case of *Adkins v. Children's Hospital,* 261 U. S. 525; 43 S. Ct. 394; 67 L. Ed. 785, and evincing a change of attitude on the part of the majority towards the subjects treated in those cases, does not change the fundamental concepts of due process which represents the development of constitutional construction down through the ages.

Not long before he left the bench, Mr. Justice Brandeis thus expressed the rule in striking down the Frazier-Lemke Act (*Louisville etc. Bank v. Radford,* 295 U. S. 555; 79 L. Ed. 1593):

> "We have no occasion to consider either the causes or the extent of farm tenancy. . . . Nor need we consider the occupations of the beneficiaries

> of the legislation. . . . The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the bank without compensation, and given to Radford rights in specific property which are of substantial value. . . . . The Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken for a wholly public use without just compensation."

A brief glance at the history of this Court's treatment of employer-employee relationships prior to the Parish case will be found helpful. Efforts at wage and hour legislation have been based, in considerable part, in the decision of the Court in *Wilson v. New*, 243 U. S. 332; 61 L. Ed. 755. It is clear from the concurring opinion of Mr. Justice McKenna that the Court held a clear line of demarcation between hour legislation and wage legislation:

> "There is certainly a difference between the prescription of the time of service and the prescription of compensation for the service, and the difference is observed in the speech and conduct of men; it is observed in the regulations of legislation. It has never been supposed that the agitation for an eight-hour day for labor, or the legislation which has responded to it, was intended to fix or did fix the rate of wages to be paid."

This same distinction clearly appears from the main opinion written by Mr. Chief Justice White, who makes it clear that the Act did not in any way involve the confiscation of property:

> "When it is considered that no contention is made that, in any view, the enforcement of the Act would result in confiscation, the misconception upon which all the propositions proceed becomes apparent."

The right of private contract was well expressed by Mr. Justice Pitney in *Coppage v. United States,* 236 U. S. 14; 59 L. Ed. 446:

> "Included in the right of personal liberty and the right of private property. . . . is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense. The right is as essential to the laborer as to the capitalist,— to the poor as to the rich. . . . ."

To the same effect is the language of Mr. Justice Harlan in *Adair v. United States,* 208 U. S. 174; 52 L. Ed. 442:

> "The right of a person to sell his labor upon such terms a he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . .; and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Assigning very much the same reasons, the Court struck down the act of Congress attempting to fix a minimum wage law for the District of Columbia in *Adkins v. Children's Hospital* (supra). A like fate was accorded a statute of the State of New York in *Morehead v. New York,* 298 U. S. 587; 80 L. Ed. 1347, and for like reasons, though other additional reasons were given by the Court for the decision.

Except for the Parish case, therefore, the Supreme Court is committed definitely, by a long line of decisions, to the proposition that the right of employee and employer to contract with respect to wages is one protected by the

Fifth Amendment; and that statutes seeking to abridge it run afoul of the due process clause. The Parish case, therefore, is to be considered as authority only insofar as it sanctions the right of a State to abridge by statute this fundamental contractual relationship, the decision being interpreted as it was applied to the facts of that case.

In the statutes before the Court, there was a clear connection between the evil sought to be remedied and the means provided for combatting it. That is not true of the act now before the Court. That case is authority only for the right of a State to legislate concerning the health, morals and personal welfare of its citizens. Such is not the case here. The draftsmen of this Act had to relate it, not only to the police power to protect the health and morals of the people, but to couple it up with interstate commerce. That brings about an essential difference.

How, under the declaration of Congressional policy, can it be found that things which adversely affect the health and morals of the people in a given area can produce a deleterious effect on interstate commerce? There is no contention that the receiving of a wage by a person in one State has a harmful effect on the health or morals of a person in another State.

Do the proponents of the Act claim that, due to the fact that a person receives low wages in one State and becomes thereby afflicted with pellagra, or hookworm, those maladies are likely to spread through interstate commerce and affect workers in other areas? If that is not their contention, how can the "health efficiency and general well being" of workers in one state affect those same items of governmental solicitude in another State? Another essential difference lies in the fact that this Act is not an hour law at all, but a wage law, pure and simple. There is no limitation on the hours

an employee may work, so long as his pay is suited to the time worked. An employer could require an employee to work 42 consecutive hours without paying him any over-time; or, he could require him to work 24 hours every day of every week, provided he paid over-time for the excess hours.

In the light of that fact, all of the reasoning which formed the basis of the Parish case disappears. A worker (male or female) is not protected from working a day and night and then another day, at the will of his employer; and he is not protected from being required to work any number of hours in a week, in consideration of an advance in pay. All of the solicitude which led the Court in the evolution of attitude finally reaching the point where it would approve the wage and hour law for women, and for unfortunates generally, disappears in connection with a law which places no limit on the hours employees may be called upon to work.

The Court will not forget that no wage and hour law on a national scale has been approved. The Court specifically limited its holding in *Wilson v. New* to workers in a business affected with a public interest, and laid stress on the fact that the measure, insofar as it related to wages, was a temporary one only to meet a passing emergency.

The kind of legislation States may pass and that which will be found proper for the Federal Government are entirely different matters. Mr. Justice Holmes was accustomed to dwell on the thought that the States should be accorded a wide latitude in social legislation—looking upon them as a group of laboratories in which government experiments might be tried on a small scale, in order that, through trial and error, the people of the nation might advance towards more perfect government. Stress was always laid on the fact that experiments conducted in so limited an area and on so

small scale were not likely to produce such large or mischievous results. That right of experimentation has never been accorded the Federal Government.

The quality and quantity of police power possessed by the State vastly exceeds, of course, that conceded to the Federal Government. The very division of powers so fundamental in our form of government allocates to the units of local self-government the duty to look after the health and morals of the people in the fields which lie so close to the intimate details of daily living. No concept has been more jealously guarded than that.

There are manifestly a multitude of considerations which might lead to the approval of a stringent police regulation, when passed by a State, which would condemn it entirely if attempted on a national scale. The "necessities of existence" vary so tremendously in a broad nation like this that those who would attempt to legislate intelligently with respect to it on a national scale would have to be possessed of omniscience. It is one thing to grant to the legislature the right to control the intimate daily lives of a relatively homogenious people in a small geographical area; it is another thing to attempt to lay dawn hard and fast rules by which people must live in a nation of one hundred thirty million people of every race, tongue and religion. It might be relatively simple to act intelligently in prescribing rules of conduct in connection with a State predominantly agricultural or predominantly industrial; while at the same time it might be impossible to deal wisely with the whole nation, in which there are such vast differences in climate, occupations and institutions.

Finally, any attempt at police regulation must stop short of confiscation within the inhibition Mr. Justice White mentioned in the quotation supra, from *Wilson v. New*. No ques-

tion was involved in the Parish case of the confiscation of the property of any litigant or the annihilation of any industry, whether of an individual or in a given area.

Such is very pointedly involved here. Under the construction of this Act, made by the Administrator, as we have abundantly shown above, it will be perfectly all right that the property of these petitioners, and many others, be confiscated, provided the textile industry as a whole is served. The Parish case is not authority for such a holding, or any thing resembling such a holding, and we apprehend that no respectable authority can be found which will form the basis for such a concept.

Under the authorities here discussed, it is respectfully submitted that this statute, as interpreted and sought to be applied by the Administrator, would work an arbitrary taking of the property of these petitioners without due process of law, in contravention of the Fifth Amendment.

SUMMARY AND CONCLUSION

On the basis of the foregoing argument we submit that it conclusively appears that the textile industry was not seasonably defined for the promulgation and operation of the order here under review, and that in making the definition finally adopted the Administrator prevented the Committee from exercising its function of establishing classifications within the industry and usurped that function himself; and that his conduct in this behalf left the Committee so confused in its deliberations that it could not properly function within the narrow field left to it.

It has also been pointed out that the procedure of the Industry Committee was not in accordance with law in that it was prevented from exercising power and discretion specifically committed to it by the Act, and that it failed and

refused to proceed in line with the purposes and provisions of the Act, especially with regard to the establishment of classifications, the investigation of relevant factors and conditions, and that it was not permitted to follow inquires into relevant matters insisted upon by some of its members.

It has been shown that the Administrator's conclusion that the proposed minimum wage will not substantially curtail unemployment in the textile industry, and particularly in the Southern Small Mill Group, is not supported by substantial evidence, in that incompetent and irrelevant evidence has been made the sole basis of these findings in the face of the fact that even such evidence demonstrated that there would be substantial unemployment in the Southern Small Mill Group, and while the Administrator had before him direct and uncontradicted testimony offered by these petitioners to show the facts to be contrary to his findings.

We believe that the foregoing argument clearly establishes the error of the Administrator's finding that the minimum wage should be uniform, and that his conclusion on this point was without the support of substantial evidence. In this connection we have pointed out the universal difference in wage structure between the South and North, as well as between the small towns and semi-rural communities and the large cities; and also the differentials established by the Government through N.R.A. wages, social security payments, Government contract payments, and the WPA wage scale. Our contentions are supported by the uncontradicted proof of existing differences in wage scales, a factor prescribed by Congress as one of the values to be used in determining whether or not classifications should be established, and what wages should be established within the industry or classifications. We have further demonstrated the need for

differentials, as recognized by Congress, because of differences in production cost, transportation cost, living cost, and competitive conditions within the industry.

It has been demonstrated that the Administrator's general conclusions upon which his order was based do not make the necessary findings to support the order under review, and when interpreted against the background of his findings upon related matters, show that the Administrator actually found the facts to be contrary to the conclusions necessary for the support of his order.

On the basis of the foregoing argument we submit that the order here under review is violative of the Constitution in that it invades the powers reserved to the states, is not a valid exercise of the power conferred by the commerce clause, constitutes an unwarranted delegation of legislative powers, and deprives these petitioners of their property without due process of law.

The enforcement of this wage order would mean the present undoing of these petitioners and of a good percentage of the small mills of the Deep South. Let no man doubt that. If he should be inclined to doubt it, let him consider this one fact: At the time this law went into effect the average wage paid by the small cotton mills of the whole South was a little more than 36 cents an hour. The average wage in the East at the same time was 44 cents an hour. The average wage of these petitioners was less than 28 cents. The average wage of the large mills in the seaboard States of the South was somewhere between these figures and the East. In the face of that situation, these petitioners, and the small mills generally, were barely holding their head above water. The proof shows that and the Government statistics verify it. Nobody questioned any of these facts.

Is it possible to draw more than one conclusion from them? The South was barely able to survive when the average wage difference was 16 cents an hour—well over a 50% wage differential. The handicaps of distance from markets, with consequent delay and cost of delivery of goods, and the relative non-productivity of workers engaged in a new field offset the advantages which low living costs and a low scale of wages brought about. If all other factors remain the same, will any candid person, willing to face the facts, have the hardihood to hope that the South can remain in business when wages are put at a parity with the North, or anywhere near it?

The only indictment our adversaries openly bring against the Small Mill Group is that they are what they call "marginal" mills. The only crime they are charged with committing is having machinery which will not run without human beings. The machinery in the South will make just as good cloth, is just as efficient, just as safe, just as easy to operate, just as satisfactory as any which can be bought today. The only difference is that the new machinery will run with a minimum of human assistance.

It is not charged that the South has been party to any "sweat-shop" conditions, or is "chiseling" in any degree. The South simply has not yet outgrown its industrial swaddling clothes. It has been engaged in the process of learning to crawl, in order that it may, in due time, be able to walk—a process which is slow and tedious, but one which is prescribed by the inexorable laws of life. Wages in southern mills have been increasing with a fine speed consistent with healthy growth. While wages were showing an increase in the South of 34% in the ten year period preceding 1938, those in the North were increasing 13% (R. 1241). The South is no more hostile to high wages than the North. In the vicis-

situdes of time a heavy hand has been laid on its development, bringing about conditions entirely different from those in other parts of the country. Wise men will accept the situation as it is, make a true appraisal of it and suit their action to the inexorable rules of development and growth. The threatened killing, or serious crippling, of the cotton industry in the territory where cotton is grown arouses sentiments somewhat like those expressed on page 1236 of the record.

> "It is tragic irony that the cotton industry in the 'Land of Cotton' is ruled by an Industry Committee, the majority of whom are from Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Ohio, Illinois, Nebraska and the District of Columbia. Without reflection on the ability and integrity of these gentlemen, we submit that this is regulation without representation. Since, indeed, as the evidence shows, it means the destruction of the small mills in the small communities in the rural South, it is liquidation and confiscation without representation. . . ."

The chief witness used by the Committee in that part of the hearing devoted to the Small Mill Group made little effort to hide his own conviction that the south (whose industrialists he characterized as "carpetbaggers") should reconcil itself to the inevitable serfdom of a purely agrarian existence (R. 724):

> "My candid opinion is that they might move from Mississippi, or else we might put Mississippi on relief, rather than have Mississippi gum up the industrial picture with low labor standards and low labor conditions. . . .
>
> If you draw a barrier around the State and consume all your cotton production in the State of Mississippi, then I would say go on with your Mis-

sissippi standard, in whatever way you like, but you have a national economy and we should consider the national economy. . . .

Mississippi needs more community enterprises, more canneries, more small packing plants for some of their own local products. . . .

Mississippi could be, and should be, better off, instead of competing with disadvantages of all kinds as to labor, and enforce a low labor scale against the rest of the South. . . .

No, you are not entitled to any of your own crop to manufacture for consumption, if the other fellow can beat you a whole lot doing it. . . .

We do have to have raw material regions, we do have to have agricultural regions in this country, and we cannot industrialize the whole agricultural scheme. . . ."

Not all of those who gave evidence were so critical of the South and its accomplishments. Witness the statement of the then Secretary of Commerce (R. 968):

"Crushed by the Civil War and the incredibly vicious period of reconstruction, what you have done, and are doing, in the face of economic and political handicaps which have prevailed since the war between the States, constitutes a saga of human accomplishment of which you can forever be proud. . . ."

This whole attitude finds condemnation by such industrialist friends of the wage and hour law as Mr. Clarence R. Miller, of Texas (R. 1435) and Donald Comer, of Alabama, (R. 963), who have been astounded by the efforts to turn this legislation into a weapon to augment sectional domination, and is echoed by Governor Dixon, of Alabama (R. 1050-1):

"Our people, and the Southern Governors' Conference as well, supported the principle involved in the Fair Labor Standards Act. This, in spite of the fact that the Southern States are predominantly agricultural and will thereby pay increased prices for what they buy. . . . The Act contained what we thought was safeguards against our further economic exploitation by the Northern industrialists. But it now clearly appears to us that this Act is being interpreted and administered in line with the policy of oppression followed since the tariff act of 1928, and unless our people realize what is happening, and combat it, we are likely to remain in economic serfdom for another hundred years."

This is, of course, not evidence to be considered by the Court. It was offered only in an effort to rebut similar arguments made in the first instance by those who would deny the South the differential to which it is entitled and who would strangle the infant industry of the South. At all events, this was before the Administrator, and furnishes a background from which some slight explanation of his finding may be gleaned. Where a broad constitutional question is involved, in the decision of which so much of weal or woe is wrapped up, perhaps the Court would desire to be made conversant with the atmosphere in which this struggle between the contending elements was waged.

This law, as sought to be administered, represents, probably, the widest departure yet attempted from accepted Constitutional concepts. If the theory and practical effect of this wage order are to have the sanction of the Courts, the far-reaching effects of this experiment are hard to comprehend. Inevitably, it seems, business would cease to be a local thing, and would be controlled almost entirely from the political center of this country. The predominant political

voice would have to be obeyed in the farthest reaches of this broad land. The result denounced by this court in *Heisler v. Thomas Colliery* (*Supra*),[16] will have arrived.

It is manifest that Congress intended a cautious approach to the enforcement of this law. Precipitate action is the last thing the Congressional mind desired. Congress fixed a minimum of 25 cents an hour and stepped that up after one year by 20% to a 30 cent minimum. Then a trial period of six years was provided. That is the way democracies function, if they would live. The genius of our system of government is that its delicate balances allow a "cooling off period". By the method of trial and error a democracy forges forward. It is the most inefficient form of government; but inefficient government is one of the prices men must pay for freedom.

The intent of Congress, as expressed by the Act, therefore, was that those administering it should "make haste slowly". If a trial period of six years had not been desired for this 30 cent minimum Congress would not have prescribed it. The creation of a mechanism by which the *tempo* might be stepped up was included merely to take care of the contingency, if it should be perfectly clear that industry could absorb the shock of this violent stimulant without giving its life in the process. That is all this machinery for the establishment of higher *minima* means, and Congress certainly thought experimentation with it would be done sparingly.

It is further obvious that Congress never intended the application of the law in such a way as to create a violent disturbance to the *status quo*. It was not intended that levels of economic life, established through age-old application of the laws of nature, should be violently set upon under the guise of enforcement of this Act. Those who lived through the times of the debates in Congress, the Committee hearings

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[16]260 U. S. 245, see Page 119 *supra*.

and the sampling of public opinion when the Act was passed, know full well that the sole purpose of the act was "to put a floor under wages and a ceiling above hours". That the Act should be prostituted to a purpose evinced by this wage order was a concept wholly foreign to the Congressional mind.

Equally manifest is the Congressional intent that classifications (differentials) should be established if efforts to tamper with the statutory minimum should be made. Nothing is clearer than that. No purpose is more implicit from an understanding of the Act from its four corners than that existing classifications should not be disturbed, but should be promptly recognized. Congress added its word of caution to those who would assume responsibility for the enforcement of this drastic law.

That voice the Administrator did not hear. He lacked the apperceptive basis necessary for an adequate understanding of conditions in the region where most of the industry is located. He began his deliberations with the conviction that certain evils existed and that it was his function to remedy those evils by ordering an increase in wages without the grant of differentials. His idea and purpose throughout the hearing before him was that he was then making a showing to give color to the action he then knew would follow. This is evidenced by the statement of his General Counsel, made when the hearings were begun.[17] Any attempt at an analysis of the findings and conclusions of the Administrator must convince anyone that he had little faith in those conclusions himself, but that his reliance thereon was in the hope that they would prove sufficient to sustain the order on Judicial review.

[17] (Transcript, Page 9) "Now, a word as to cross examination. The lawyers present will realize that this is not a judicial or a quasi-judicial hearing. It is hardly even a quasi-legislative hearing. It is simply a fact-finding inquiry desired to serve as the basis for administrative action."

He selected a Committee, with the viewpoint of the North to administer a law whose present effect would be felt in the South alone; he vacillated in his definition of the textile industry until the day the Committee made its report; he made a definite classification within the textile industry by excluding most of the wool segment of it, and he included many things not belonging to textiles; he exposed the Committee largely to subordinates from his office for their information as to the state of the textile industry and he pushed them along to a hasty conclusion of their labors.

In considering their recommendation, he relied, almost exclusively, on those who worked in his Department; he based his findings on hearsay evidence, having to do with averages alone, and he turned a deaf ear to the positive and undisputed testimony of those from the South who would bear the burden of the recommendation; he was driven to recognize that his wage order was going to destroy some portion of Southern industry; he did not know how much, but he felt that it was not a large enough proportion to warrant his segregating it from the national whole, in order that it might have the protection it asked.

The order he promulgated will have the inevitable effect of taking the property of these petitioners for the benefit of others at the end of a proceeding which did not square itself with rudimentary requirements of fair play, so recently expressed by this Court as the essential basis for any order of a like tribunal. Considerations of humanity, of a due regard for Constitutional principles and of the clearly indicated will of Congress join with the demand of the cold letter of the law in requiring, at the hands of this Court, a prompt disapproval of the actions of the Administrator. His order should be set aside.

Respectfully submitted,
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Ben F. Cameron.